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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

J. J. CURRAN and JACQUELYN L. CURRAN
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on May 12, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals (A1-A38)[1] is not yet officially reported and is unofficially reported at [Current Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,390. The opinion of the District Court (A39-A49) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Section 4b of the Commodity Exchange Act, as amended, 88 Stat. 1413, 7 U.S.C. § 6b (1974); Commodity Futures Trading Commission ("CFTC") Reg. § 180.3, 17 C.F.R. § 180.3. Section 4b and other pertinent sections of the Commodity Exchange Act ("CEA") are appended hereto (A52-A57). CFTC Reg. § 180.3 is appended at pages A58-A60.

STATEMENT OF THE CASE

In 1973, respondents J. J. Curran and Jacquelyn L. Curran (the "Currans") opened several commodity trading accounts with Merrill Lynch, a broker of securities and commodities. Upon opening the accounts, the Currans signed agreements to submit to

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[1] "A___" page references are to the Appendix of this Petition.

arbitration disputes that might arise with Merrill Lynch. The commodity trading in the Currans' accounts resulted in losses and the accounts were closed in April, 1974.

In April, 1976, the Currans brought suit for damages in the United States District Court for the Eastern District of Michigan. The Currans alleged violations of sections 5 (failure to register), 12(2) (misleading statements) and 17(a) (fraud) of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. §§ 77e, 77*l*(2), 77q(a); section 15(c)(1) (fraud and rulemaking powers) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78o(c)(1), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5; and section 4b (fraud) of the CEA, 7 U.S.C. § 6b.[2] The Currans also alleged breaches of duties owed under the Michigan Uniform Securities Act, Rules and Regulations of the National Association of Securities Dealers, the New York Stock Exchange and the Chicago Mercantile Exchange and common law principles of fraud, negligence and contract. Jurisdiction was alleged pursuant to section 22(a) of the 1933 Act, 15 U.S.C. § 77v(a); section 27 of the 1934 Act, 15 U.S.C. § 78aa; sections 1331, 1332 and 1337 of Title 28 of the United States Code; and by virtue of pendent jurisdiction.

Upon Merrill Lynch's motion, the District Court dismissed the Currans' claims under the 1933 and 1934 Acts, and directed the remaining claims to arbitration in accordance with the parties' agreement. In so ruling, the District Court held that the Currans' commodity

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[2] The Complaint alleges activities (fraud) such as are made unlawful by section 4b of the CEA, 7 U.S.C. § 6b. The Complaint actually specifies violation of "Section 6 of the Commodity Exchange Act." Petitioner assumes, however, as did the Court of Appeals (A37) that respondent seeks recovery under CEA section 4b.

trading accounts did not constitute "securities" within the meaning of the 1933 and 1934 Acts and that, upon dismissal of the federal securities claims, there was no impediment to enforcement of the arbitration agreement in accordance with the Federal Arbitration Act, 9 U.S.C. § 3.[3]

The Currans appealed from the District Court's ruling that no cause of action had been stated under the federal securities laws and also argued that the District Court had erred in submitting the dispute to arbitration because the arbitration agreement did not conform to requirements set forth in CFTC Reg. § 180.3. That regulation (A58), effective November 29, 1976, provides that, to be enforceable, arbitration clauses must, *inter alia*, be signed separately and must apprise the customer, in bold-face type, that he may be waiving a right to sue in court. The arbitration agreements signed by the Currans in 1973 do not meet these requirements.

The Court of Appeals unanimously affirmed the District Court's ruling that the Currans' federal securities claims should be dismissed for the reason that no security was involved. The Court also adopted the Currans' argument that CFTC Reg. § 180.3 should be applied retroactively to invalidate the arbitration agreement between the parties. The Court of Appeals then raised, *sua sponte*, the issue of whether a private cause of action exists under the anti-fraud provisions of the CEA. Without benefit of briefing or argument by the parties, a majority of the panel concluded that the CEA provides an *implied* private right of action for

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[3] Merrill Lynch conceded that *Wilko* v. *Swan*, 346 U.S. 427 (1953), precluded enforcement of the arbitration agreement so long as the federal securities claims remained at issue.

fraud. The Court accordingly reversed the District Court's order staying the CEA claims pending arbitration, remanding those claims for trial on the merits.

Judge Phillips dissented, reasoning that Congress' failure expressly to provide a private judicial remedy under the CEA precludes implication of such a right. Judge Phillips relied upon the restrictive approach to implication of private remedies manifest in this Court's recent decisions.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' implication of a private right of action for fraud under the Commodity Exchange Act raises an important question of federal law that should be settled by this Court.

The commodities futures market is a risk-shifting mechanism that provides a stabilizing influence on the national economy. An orderly futures market is of paramount importance to producers and commercial users of commodities, to the exchanges, brokers and speculators involved in the market itself, and to the general population which profits by the stabilized availability and price of goods that an orderly futures market promotes.[4]

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[4] S. Rep. No. 93-1131, 93d Cong. 2d Sess. 11-19, *reprinted in* [1974] *U.S. Code Cong. & Ad News* 5843, 5852-60. *See also, Leist* v. *Simplot*, Nos. 79-7402, 7464, 7482 (2d Cir., July 8, 1980) (Slip op. at 4022-28).

The issue presented by this petition involves the balance achieved by Congress in its regulation of the market and the threat posed to that balance by the interjection of judicially created remedies. Moreover, the issue presented by this petition has left the lower federal courts hopelessly divided and it would be consistent with the role of this Court to provide guidance on this question, thereby promoting conservation of judicial resources and sparing those associated with the commodities industry the costs and delay of duplicative litigation.

A. Congress has enacted a comprehensive scheme of commodities regulation which should not be altered by the addition of judicially inferred remedies.

The federal government has been involved in commodities regulation since passage of the Grain Futures Act of 1922. The 1922 Act required grain exchanges to be federally licensed and to assume responsibility for price manipulation by their members.

The degree of regulation provided by the 1922 Act proved inadequate and in 1936 Congress enacted the CEA, broadening federal regulatory and enforcement powers. The scope of coverage was extended to commodities other than grains, to traders and brokers as well as exchanges, and powers were granted to curb excessive speculation by large operators and to prosecute price manipulation as a criminal offense. Section 4b was added to suppress cheating, fraud and fictitious transactions which were impairing the services of the market.[5]

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[5] See, S. Rep. No. 93-1131, 93d Cong. 2d Sess. 14, *reprinted in* [1974] *U.S. Code Cong. & Ad. News* 5843, 5855.

The commodities market has grown dramatically since 1936. A recent report shows the regulated industry now includes 12 existing or proposed exchanges, 329 brokerage firms, 555 money managers, 914 trading advisors and over 31,000 salesmen.[6] In ten years the volume of commodity futures contracts traded has expanded seven-fold and what was previously a business primarily of interest to floor traders and commercial hedgers now involves hundreds of thousands of individual investors[7] and the trading of futures contracts for commodities valued at an estimated $1.5 trillion annually.[8]

Federal regulatory powers have also grown. In 1968 Congress added new commodities to those regulated, increased penalties for certain violations, authorized issuance of cease and desist orders, imposed minimum financial standards on commission merchants and required enforcement by contract markets of their trading rules and contract terms.[9]

Still dissatisfied with the performance of the commodities futures markets and the adequacy of regulatory protection,[10] Congress responded in 1974

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[6] Remarks of Philip F. Johnson, Chairman, ABA Committee on Commodities Regulation, 35 Bus. Law. 691 (Special Issue) (March, 1980).

[7] Remarks of Hon. James M. Stone, Chairman, Commodity Futures Trading Commission, *Id.* at 692.

[8] Wall St. J., Jan. 9, 1979, at 38, col. 5 (estimate for 1978).

[9] S. Rep. No. 93-1131, 93d cong. 2d Sess. 14, *reprinted in* [1974] *U.S. Code Cong. & Ad. News* 5843, 5855.

[10] *Id.*, [1974] *U.S. Code Cong. & Ad. News* at 5856.

with sweeping revisions of the CEA. These amendments, entitled the Commodity Futures Trading Commission Act of 1974 ("1974 Amendments") created the CFTC[11] and explicitly vested this new agency with "*exclusive* jurisdiction" over regulation of commodity futures trading.[12]

The CFTC was created to assure that a single expert agency would have responsibility for developing a coherent regulatory program encompassing futures trading and related activities.[13] Fulfillment of the CFTC's mandate was facilitated by other provisions of the 1974 Amendments which further strengthened regulatory control over the commodities markets. For example, the CFTC was given authority to seek injunctive relief restraining any person from violating the CEA,[14] and to impose against registered persons, after hearing, a civil penalty of up to $100,000 for each violation of the Act.[15]

A prominent feature of the 1974 Amendments was provision for reparation proceedings before the CFTC to adjudicate customer complaints against registered persons, including brokers such as Merrill Lynch.[16] A

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[11] Section 2(a)(2)-(11), 7 U.S.C. § 4a(a)-(j).

[12] Section 2(a)(1), 7 U.S.C. § 2 (emphasis added).

[13] S. Rep. No. 95-850, 95th Cong., 2d Sess. 13, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 2087, 2101.

[14] Section 6c, 7 U.S.C. § 13a-1.

[15] Section 6(b), 7 U.S.C. § 9.

[16] Section 14, 7 U.S.C. § 18.

detailed procedure was established, providing for the filing of customer complaints with the CFTC, and investigation of such claims by that body.[17] If the investigation supports further action, an administrative law judge is appointed to hear the claim. If a violation of the CEA is found, the CFTC, by statute, "shall" impose a damage award in favor of the aggrieved customer,[18] and such awards are enforceable in the federal district courts,[19] and reviewable in the courts of appeals.[20]

During the 44 years that section 4b has been in effect, and notwithstanding the extensive reconsideration and revision that Congress has afforded the CEA during that period (most notably in 1974), Congress has not seen fit expressly to authorize a private judicial right of action for violation of that section.

Several bills that would have expressly provided private judicial remedies for violations of the CEA were introduced in the 93d Congress but not enacted. One proposed amendment would have provided a right of action for restitution in the federal district courts for a

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[17] *Id.*

[18] Section 14(b), (c) and (e), 7 U.S.C. § 18(b), (c) and (e).

[19] Section 14(f), 7 U.S.C. § 18(f).

[20] Section 14(g), 7 U.S.C. § 18(g).

non-willful violation of "any provision of this Act or regulation or order issued thereunder," with a treble damage remedy for willful violations.[21] This proposal and several others like it were rejected by Congress.[22]

Further amendment to the CEA occurred in 1978, including the addition of a cause of action in favor of the States, acting as *parens patriae*, to enjoin violations of the Act, and original jurisdiction over such actions is expressly granted to the federal district courts.[23]

It is apparent that during consideration of the 1978 Amendments Congress was well aware that no private right of action was included within the regulatory scheme. A comprehensive list of public and private remedies provided *customers* under the CEA was set forth in the authoritative Senate Report. Mention of a private judicial remedy is conspicuous by its absence:

> The Commodity Exchange Act provides many customer protections and remedies. The Act directs the Commission to promulgate and administer a regulatory program that includes registration of commodity professionals, segregation of customers' funds by futures commission merchants, establishment of dual trading guidelines, creation of a procedure for the adjudication of reparation claims, monitoring

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[21] S. 2837 (Hart Bill), 93d Cong., 1st Sess., § 505(a)-(b), 119 *Cong. Rec.* 42688 (1973).

[22] *E.g.*, H.R. 11195 (Smith Bill), 93d Cong., 1st Sess. § 17 (1973) (treble damages); S. 2578 (McGovern Bill), 93d Cong., 1st Sess., Part I, § 20, 119 *Cong. Rec.* 33947-48 (1973) (treble damages).

[23] Section 6d, 7 U.S.C. § 13a-2.

> exchange arbitration procedures and disciplinary actions, and licensing of industry self-regulatory futures associations. Moreover, customers are afforded protection through the Commission's power to sue directly for injunctive relief and to invoke a full range of administrative remedies where appropriate to curb unlawful behavior.[24]

Aware that a private judicial damage remedy was not afforded customers under the CEA, Congress, as before, declined to authorize such a remedy.

The foregoing[25] reveals the methodical development over a 58 year period of a comprehensive scheme to regulate the commodities industry. Congress carefully identified the problems to be dealt with, balanced the interests of those involved in the market and enacted regulations and means of enforcement tailored to achieve its goals. In so doing, Congress defined the role to be played in the regulatory scheme by the federal courts. The district courts are given original jurisdiction in enforcement and injunctive actions by the CFTC,[26] and in injunctive actions by the States;[27] and are given

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[24] S. Rep. No. 95-850, 95th Cong., 2d Sess. 12-13, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 2087, 2100-01.

[25] The discussion of legislative history in this petition is necessarily abbreviated. A more complete analysis of that history, as it specifically relates to legislative intent concerning private remedies, is provided by the majority and dissenting opinions of Judges Friendly and Mansfield in *Leist* v. *Simplot*, Nos. 79-7402, 7464, 7482 (2d Cir., July 8, 1980). See also, pp. 19-23, *infra*.

[26] Sections 6b, 6c, 7 U.S.C. §§ 13a, 13a-1.

[27] Section 6d, 7 U.S.C. § 13a-2.

enforcement jurisdiction in reparation awards.[28] The courts of appeals are given statutory jurisdiction to review reparation awards and suspensions of trading privileges.[29]

The limited jurisdiction granted the federal courts is an essential element of the balance achieved by Congress in its regulatory scheme. By enactment of the provisions for resolution of disputes, sections 5a(11) and 14, 7 U.S.C. §§ 7a(11), 18, Congress chose not to impose upon registered persons such as Merrill Lynch the substantial expense and disruptive impact of federal litigation of private damage claims, *see Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 740-43 (1975), the burden of which would of necessity be passed on to the overall market in the form of higher commissions and diminished efficiency. Creation of a judicially inferred right of action would alter the balance inherent in the legislative scheme.

Implication of a private right of action would also impose an unnecessary burden upon the federal judicial system. The already massive and ever-increasing volume of commodities trading, often based upon verbal orders, gives rise to a significant number of customer-broker disputes. Congress expressly enacted the means by which such disputes are to be resolved, and specified only a limited role for the federal judiciary.[30] The majority below would scuttle this legislative plan, granting access to the federal courts for

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[28] Section 14(f), 7 U.S.C. § 18(f).

[29] Sections 6(b), 14(g), 7 U.S.C. §§ 9, 18(g).

[30] Section 14(f), 7 U.S.C. § 18(f) (enforcement of awards); section 14(g), 7 U.S.C. § 18(g) (appellate review).

adjudication of all cases alleging breaches of duties claimed to exist under section 4b. Such a burden on the federal courts is unnecessary since actions such as this one, alleging breach of fiduciary duty and fraud, not only are cognizable under section 14 reparation proceedings, but are a mainstay of state court litigation.

B. Implication of a private judicial right of action for fraud under the Commodity Exchange Act is an issue that has divided the lower federal courts.

Whereas prior to the CEA's substantial amendment in 1974, the few lower courts to treat the issue had generally recognized an implied private remedy under section 4b,[31] such harmony no longer exists. Creation in 1974 of the CFTC and the express provision for reparation proceedings to adjudicate customer complaints against registered persons, together with development of the restrictive approach to implication of private remedies manifest in this Court's recent decisions,[32] has left the lower federal courts sharply divided on the issue of whether an additional judicial remedy may be implied under section 4b.

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[31] *See, e.g., Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967). Cf. *Deaktor* v. *L.D. Schreiber & Co.*, 479 F. 2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973).

[32] *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U.S. 453 (1974); *Cort* v. *Ash*, 422 U.S. 66 (1975); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *Piper* v. *Chris-Craft Industries*, 430 U.S. 1 (1977); *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979).

Several district court cases have reached the same result as the majority opinion below, implying a private right of action[33], while others support Judge Phillip's dissenting view that no implied private remedy exists.[34]

The divided panel below is the first court of appeals to address this issue. The Court of Appeals for the Second Circuit, in *Leist* v. *Simplot*, Nos. 79-7402, 7464, 7482 (July 8, 1980), also by a divided panel, recently reached a similar result, although *Leist* did not involve a section 4b claim by a customer against his own broker.

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[33] *Witzel* v. *Chartered Service Corp. of New York, Ltd.*, Civ. No. 4-79-610 (D. Minn, May 27, 1980); *Navigator Group Funds* v. *Shearson Hayden Stone, Inc.*, No. 77 Civ. 5350 (S.D.N.Y., March 20, 1980); *Smith* v. *Groover*, 468 F. Supp. 105 (N.D. Ill. 1979); *R. J. Herely & Son Co.* v. *Statler & Co.*, 466 F. Supp. 345 (N.D. Ill. 1979); *Jones* v. *B. C. Christopher & Co.*, 466 F. Supp. 213 (D. Kan. 1979); *Poplar Grove Planting & Refining Co.* v. *Bache Halsey Stuart Inc.*, 465 F. Supp. 585 (M.D. La. 1979); *Hofmayer* v. *Dean Witter & Co., Inc.*, 459 F. Supp. 733 (N.D. Cal. 1978); *Berenson* v. *Madda Trading Co.*, [1977-80] Comm. Fut. L. Rep. (CCH) paragraph, 20,689 (D.D.C. 1978); *Cf. Croll* v. *Maduff & Sons, Inc.*, No. CV 79-466-RMT (C.D. Cal., April 3, 1980); *Shearson Hayden Stone, Inc.* v. *Lumber Merchants, Inc.*, 423 F. Supp. 559 (S.D. Fla. 1976).

[34] *Mullis* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 79-172 BRT (D. Nev., July 1, 1980); *Hensley* v. *Maduff & Sons, Inc.*, 2 Comm. Fut. L. Rep. (CCH) paragraph 21,017 (C.D. Cal. 1980); *Fischer* v. *Rosenthal & Co.*, 481 F. Supp. 53 (N.D. Tex. 1979); *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 470 F. Supp. 1256 (S.D.N.Y. 1979), *rev'd sub nom. Leist* v. *Simplot*, Nos. 79-7402, 7464, 7482 (2d Cir., July 8, 1980); *Berman* v. *Bache, Halsey, Stuart, Shields, Inc.*, 467 F. Supp. 311 (S.D. Ohio 1979) (overruled *sub silentio* by *Curran*); *Comstock Investors, Inc.* v. *Rosenthal & Co.*, [1977-80] Comm. Fut. L. Rep. (CCH) paragraph 20,934 (C.D. Cal. 1979); *Alkan* v. *Rosenthal & Co.*, [1977-80] Comm. Fut. L. Rep. (CCH) paragraph 20,797 (S.D. Ohio 1979) (overruled *sub silentio* by *Curran*); *Bartels* v. *International Commodities Corp.*, 435 F. Supp. 865 (D. Conn. 1979); *Consolo* v. *Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F. Supp. 447 (N.D. Ohio 1976) (overruled *sub silentio* by *Curran*). *Cf. Stone* v. *Saxon & Windsor Group, Ltd.*, [1977-80] Comm. Fut. L. Rep. (CCH) paragraph 21,000 (N.D. Ill. 1980); *Liang* v. *Hunt*, [1977-80] Comm. Fut. L. Rep. (CCH) paragraph 20,880 (N.D. Ill. 1979).

In addition to the foregoing, there are undoubtedly many other federal court cases wherein the issue has not yet been decided or the decisions are not reported. Merrill Lynch is itself a party to several such pending cases.[35]

II. The Court of Appeals' implication of a private right of action for fraud under the Commodity Exchange Act conflicts in principle with the decisions of this Court in *Transamerica* and *Touche Ross*.

The majority opinion below implied a private judicial right of action under the CEA notwithstanding the absence of any persuasive evidence that Congress intended that such a right exist, and despite substantial evidence to the contrary. The majority's holding and the analysis by which it was reached are both in sharp conflict with guiding principles of statutory construction set forth by this Court in *Transamerica Mortgage Advisors, Inc* v. *Lewis*, 444 U.S. 11 (1979) and *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979). Rather than the sharp critical focus upon the narrow question of legislative intent, and the incisive search for "persuasive evidence" of intent that a private remedy exists, as required by *Touche Ross* and *Transamerica*, the majority below purported to follow the more diffuse analysis of *Cort* v. *Ash*, 422 U.S. 66 (1975), and in so doing, was drawn to render policy judgments beyond the scope of its proper judicial function.

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[35] *E.g., Dart Partnership* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. H80-1205 (D. Md.); *Para* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 80-667 (W.D. Wash.); *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 76 Civ. 3085 (S.D.N.Y.); *Wanty* v. *Merrill Lynch, Pierce, Fenner & Smith*, No. 77 Civ. 869 (RLC) (S.D.N.Y.); *Zeltser* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 80 Civ. 4009 (S.D.N.Y.).

Cort set forth four criteria to guide the courts in deciding whether to imply a private cause of action[36]. The majority below applied these four factors and found that each supports implication of a private right of action for fraud under the CEA (A30-A34). The breadth of the four part *Cort* analysis has, however been sharply criticized, *Cannon* v. *University of Chicago*, 441 U.S. 677, 730-49 (1979) (Powell, J., dissenting) and its focus has since been sharpened by this Court:

> It is true that in *Cort* v. *Ash* . . . the Court set forth four factors that it considered 'relevant' in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. *The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.*

Touche Ross, supra, at 575 (emphasis added). The holdings of this Court subsequent to *Cort* also demonstrate the proper methodology of the "central inquiry" into Congressional intent.

The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction, *Transamerica, supra*, at 15, and analysis must begin with the language of the statute itself. *Touche Ross, supra*, at 568. Further, "[a]bsent a *clearly expressed* legislative intention to the

[36] "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted' . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S. at 78.

contrary" the language of a statute "must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, — U.S. —, 48 U.S.L.W. 4658, 4659 (June 9, 1980) (emphasis added).

The language of the CEA contains no reference whatever to a private judicial right of action for violation of its anti-fraud provisions. Its language is, nonetheless, instructive: most significantly, the CEA provides a full panoply of criminal, civil and administrative remedies to enforce its regulatory function.

The majority below found this broad range of express enforcement measures to be evidence of Congressional intent to provide strong regulation of the commodities markets and then leapt, impermissibly, to the further conclusion that an *additional* remedy, a private right of action, is compatible with this goal and should therefore be judicially implied. This conclusion is at odds not only with the teachings of *Transamerica* and *Touche Ross*, but with the doctrine of the separation of powers.

The fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person. *Touche Ross, supra*, at 568. Instead, the judicial task is "limited solely to determining whether Congress intended to create the private right of action asserted." *Id.* Moreover, "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' " *Transamerica, supra*, at 19-20.

The CEA provides an express remedy for the type of violations asserted by the Currans. Section 14 provides for hearing before an administrative law judge and for damage awards enforceable and reviewable in the federal courts. These express provisions compel "the negative of any other mode," including an implied judicial remedy. They also render an implied remedy unnecessary and, as this Court held in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 25-26 (1977), creation by judicial implication of a private damage remedy is proper only if it is *necessary* to effectuate Congress' goals. *See also, Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 734, 736 (1975).

The CEA's express provision for private damage awards arising out of statutory reparation proceedings further compels the conclusion that "[o]bviously . . . when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly."[37] *Touche Ross, supra*, at 572. In addition, the full panoply of *express* provisions for enforcing duties imposed by the CEA and section 4b in particular make it "highly improbable that 'Congress absentmindedly forgot to mention an intended private action.' " *Transamerica, supra*, at 20 (quoting *Cannon, supra*, at 742 (Powell, J., dissenting)).

Transamerica contains the clear admonition that when a statute fails expressly to provide a private judicial right of action while providing for other express remedies, an additional right of action cannot be implied by the courts absent "persuasive evidence of a

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[37] *See also*, sections 308, 309, Packers and Stockyards Act, 7 U.S.C. §§ 209, 210 (providing agency reparation proceedings analogous to CEA section 14, while *expressly* providing an alternative judicial right of action).

contrary legislative intent." 444 U.S. at 20. The majority below failed to heed this admonition. No persuasive evidence of a congressional intent to provide a private judicial right of action for fraud exists. Indeed, the only support offered by the majority below for its holding that Congress intended an implied private remedy to exist is the fact that a few lower federal courts, using the discredited "tort theory" for implying a private right, had, previous to the 1974 Amendments, recognized such a right and that in the hundreds of pages of legislative history underlying the 1974 Amendments, one legislator had alluded to these decisions. This is not the "persuasive evidence" required by *Transamerica*, especially in light of the considerable evidence in the legislative history that no private judicial remedy was intended.

Moreover, the excerpts of legislative history offered by the majority in support of its holding are misconstrued. For example, the majority opinion states that "Congress recognized that the 'courts [had] implied a private remedy for individual litigants in the Commodity Exchange Act' " (A31, n. 27), citing the remarks of Representative Poage.[38] Representative Poage was, in fact, citing such private litigation as a threat to the self-regulatory activities of exchanges. Representative Poage expressed the view that private suits against exchanges for failure to enforce their rules offered exchanges "solid reason for shrinking the protection given the customer and the public through self-regulation".[39] In context, Representative Poage was citing private litigation as a discordant note in the

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[38] 119 *Cong. Rec.* 41333 (1973).

[39] *Id.*

regulatory scheme and as further reason for "Congress to act, and act expeditiously through meaningful, thoughtful change that is well reasoned and sure"[40] to provide the comprehensive, coherent and balanced regulatory scheme embodied in the 1974 Amendments.

Similarly misplaced is the majority's reliance (A31,n. 27) upon comments made during Senate hearings on the 1974 Amendments.[41] The testimony cited includes that of Professor Schotland, who argued emphatically for enactment of the private civil damage remedy contained in the Hart bill.[42] Professor Schotland also argued against the broad private reparation proceedings ultimately enacted as CEA section 14. The thrust of Professor Schotland's remarks was that adjudication of private damage claims should be in the courts and not in the CFTC. The Professor also argued that "[i]f you do choose to retain such virtually unprecedented responsibility and burden [section 14 reparation proceedings] in this regulatory body, there should be explicit language in the statute that Federal and State courts are still open if a complainant prefers to go to trial there."[43] As the 1974 Amendments make clear, Congress opted in favor of granting jurisdiction over

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[40] *Id.*

[41] *Hearings on* S. 2485, S. 2578, S. 2837 and H.R. 13113 *Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess. pt. 1 at 205, pt. 3 at 737 (1974).

[42] S. 2837, 93d Cong., 1st Sess. § 505 (a), 119 *Cong. Rec.* 42688 (1973).

[43] *Hearings on* S. 2485, S. 2578, S. 2837 and H.R. 13113 *Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess., pt. 3 at 737 (1974).

private damage claims to the CFTC under section 14 and against an alternative private remedy in the federal courts.

The majority below also places reliance (A31, n. 27) on the remark of Senator Clark that "section 201 of [H.R. 13113] may prohibit all court actions"[44] as evidence that the proviso to section 2(a)(1), 7 U.S.C. § 2, was added to preserve a private right of action for damages in the federal courts. The proviso states that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State." The majority below, however, ignores the statements of Representative Rodino, Chairman of the House Committee on the Judiciary, who recommended that the proviso be added to avoid an interpretation that the jurisdictional provision eliminates the jurisdiction of state courts over contract claims and the jurisdiction of federal courts over anti-trust claims and suits seeking review of administrative hearings.[45]

The remark of Senator Clark, a passing reference by a single legislator, is a slim reed upon which to base a finding that Congress approved a private right of action. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc., supra*, 48 U.S.L.W. at 4662; *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 31-32 (1977); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979); *Leist* v. *Simplot, supra*, (Slip Op. at 4173) (Mansfield, J., dissenting). In view of the lengthy and authoritative

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[44] *Hearings on* S. 2485, S 2578, S. 2837 and H.R. 13113 *Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess, pt. 1 at 205 (1974).

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[45] *Id.* at 259-260. *See also, Leist* v. *Simplot, supra* (Slip Op. at 4170-4174) (Mansfield, J., dissenting).

House and Senate Reports on the 1974 Amendments, both of which are silent as to the existence of any private judicial right of action, the remarks of Senator Clark and their bearing on the construction of section 2(a)(1) as the basis for a private judicial right of action are entitled to little weight.

The language of section 2(a)(1) itself contradicts the conclusion of the majority below. The proviso states only that the 1974 legislation was not passed in derogation of jurisdiction already "conferred" upon the courts. Prior to 1974, Congress had enacted no provision "conferring" jurisdiction on the courts to entertain private actions under the CEA. While a few federal courts had found an *implied* right of action under pre-1974 law, reliance on that factor is a bootstrap argument. The courts cannot "confer" jurisdiction upon themselves.[46] Thus, only if the pre-1974 federal commodity legislation had *expressly conferred jurisdiction* on the courts to entertain actions thereunder would section 2(a)(1) be of any value in explaining away Congress' conspicuous silence on that point when it completely overhauled the CEA in 1974. Since no pre-1974 provision existed, the implications of section 2(a)(1) (if any) are far outweighed by the straightforward legislative history discussed above, which is inconsistent with any intent to legislate a private right of action.

Further, in *Touche Ross, supra,* at 577, this Court declared that reliance upon the general jurisdictional provision of a statute in attempting to imply a private right of action is misplaced and that the source of a plaintiff's rights "must be found, if at all, in the

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[46] *U.S. Const.* art. III.

substantive provisions" of the act sought to be enforced. There is no substantive provision in the CEA for a private judicial right of action.

Finally, reliance by the majority below upon the remarks of Senator Talmadge (A28) is also misplaced The Senator's statement that under the statutory reparation proceedings "the entire *appeal* process and the right of *final* determination by the courts are expressly preserved" (emphasis added) plainly does not support the inference that original jurisdiction over private damage claims also exists.

It is apparent that the majority below, in implying a private judicial remedy, gave little weight to the plain language of the statute itself or to the great volume of legislative history, neither of which supports implication of such a right. The court below neither sought nor found "persuasive evidence" of Congressional intent that a private judicial remedy be implied. The majority below thus acted in direct contravention of the teachings of *Transamerica* and *Touche Ross*.

Perhaps the gravest error of the majority opinion, however, is its willingness to substitute its own judgment for that of Congress. The majority's inquiry under the third prong of the *Cort* analysis, and its finding that implication of a private right of action is "compatible" with the underlying purposes of the legislative scheme, do not justify reading the CEA more broadly than its language and the statutory scheme reasonably permit. *Touche Ross, supra,* at 578. "The ultimate question is one of Congressional intent, not one of whether [the Court] thinks that it can improve upon the statutory scheme that Congress enacted into law." *Id.*

In *Cannon, supra* at 718, Mr. Justice Rehnquist wrote that "[n]ot only is it 'far better' for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch." Sound justification for this "extreme reluctance," as set forth by the strong dissent of Mr. Justice Powell in *Cannon*, is based upon Article III of the United States Constitution and the doctrine of the separation of powers. As presaged by the opinions of Justices Rehnquist and Powell in *Cannon*, this Court, in *Touche Ross* and *Transamerica*, has held that a private right of action will be implied only when it is clear that Congress so intended. The effect of *Touche Ross* and *Transamerica* on the four part *Cort* analysis is to give primacy to legislative intent and subordinate the question of whether an implied remedy is "consistent with the underlying purposes of the legislative scheme" for the reason that,

> the *Cort* analysis too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement . . .
>
> . . . Determining whether a private action would be consistent with the 'underlying purposes' of a legislative scheme permits a court to decide for itself what the goals of a scheme should be, and how those goals should be advanced.

Cannon, supra at 740 (Powell, J. dissenting).

The inquiry of the majority below was thus "deflected" from its proper purpose, the determination

of Congressional intent. Its deflection, and its error, are apparent from its conclusion:

> What we have done here, in our view, is to preserve the general concept of a private right of action and to provide for its continuing development, not under the securities laws generally, but under those laws of Congress which are more particularly related to the commodities market. This approach provides greater sensitivity to the specialized concerns of that area of commercial life, appears consistent with congressional intent and also allows for the development of a private right of action similar to the valuable body of law that has grown under Section 10 of the Securities Exchange Act and Rule 10b-5. (A36).

The right to "*preserve* . . . a private right of action and to *provide* for its continuing development" is that of Congress alone. Had Congress preferred a private right of action and a "valuable body of law" analogous to that which has grown under the federal securities laws, Congress certainly knew how to so provide and would have done so expressly. *Touche Ross, supra,* at 572. Congress chose, however, *not* to do so and it is beyond the province of the Judicial Branch to amend the legislative scheme and thereby alter its balance.

Implication by the majority below of a private right of action for fraud under the CEA manifests an arrogation of the constitutional powers of the Legislative Branch and violates principles so recently emphasized by this Court in *Touche Ross* and *Transamerica*.

III. The Court of Appeals' retroactive application of Commodity Futures Trading Commission Reg. § 180.3 conflicts in principle with controlling decisions of this Court.

The Court of Appeals retroactively applied a 1976 regulation to void a 1973 agreement that provided for arbitration of a claim that had ripened in 1974. The Court of Appeals so acted despite the fact that the CFTC itself has interpreted the regulation as *not* voiding pre-existing agreements to arbitrate disputes that had arisen prior to the effective date of the regulation. *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1182 n.2 (2d Cir. 1977) (Meskill, J., dissenting) (quoting brief of CFTC, *amicus curiae*).

As pointed out by the cogent dissent of Judge Meskill in *Ames*, such a ruling violates no less than three canons of construction announced by this Court:

First, the CFTC's interpretation of its own regulation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). The Court below, relying on the *Ames* majority, gave no weight to the CFTC's interpretation.

Second, a new regulation should be interpreted in such a way as to avoid interference with matured

antecedent rights. *Greene* v. *United States*, 376 U.S. 149, 160 (1964); *Bradley* v. *Richmond School Board*, 416 U.S. 696, 720 (1974). Prior to the effective date of the regulation, Merrill Lynch had an accrued right to arbitrate this dispute. The interpretation of the regulation submitted by the CFTC as *amicus* in *Ames* avoided interference with this antecedent right.

Third, a regulation should be construed, whenever possible, so as to avoid constitutional issues. *See, Ashwander* v. *T.V.A.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). The interpretation of the Court below raises the substantial due process issue of whether the right to arbitration thus abrogated is substantive or procedural, and whether such abrogation results in "manifest unfairness." *Ames, supra*, at 1177, 1179.

CFTC Reg. § 180.3 should have been construed, as recommended by the CFTC in *Ames*, so as *not* to void arbitration agreements that pertained to disputes that existed as of the effective date of the regulation.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 5, 1980

QUESTIONS PRESENTED FOR REVIEW

I.

Does the Commodity Exchange Act create an implied private right of action for fraud in favor of a customer against his broker?

II.

Should Commodity Futures Trading Commission Reg. §180.3 be given retroactive application to void arbitration agreements entered into prior to the effective date of that regulation in abrogation of the parties' right to arbitration of a dispute that arose prior to that effective date?

APPENDIX

A-1

No. 77-1300

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

J. J. CURRAN and JACQUELYN L. CURRAN, individually and as trustees of the John J. Curran Living Trust and Jacquelyn L. Curran Living Trust,

Plaintiffs-Appellants,

v.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INC.,

Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 12, 1980.

Before: LIVELY and ENGEL, Circuit Judges and PHILLIPS, Senior Circuit Judge.

ENGEL, Circuit Judge, delivered the opinion of the Court, in which LIVELY, Circuit Judge, joined. PHILLIPS, Senior Circuit Judge, (pp. 37-38) filed a separate opinion, concurring in part and dissenting in part.

ENGEL, Circuit Judge. Plaintiffs appeal from the district court's order granting partial summary judgment in favor of the defendant Merrill Lynch, Pierce, Fenner & Smith (hereinafter Merrill Lynch), and further granting Merrill Lynch's motion for stay of the remaining claims pending arbitration.[1]

[1] An order staying a pending action until the case is submitted to arbitration is appealable under 28 U.S.C. § 1292(a)(1) if the under-

In their complaint, plaintiffs John J. Curran and Jacquelyn L. Curran sought damages from Merrill Lynch for false representations made by its agents which induced plaintiffs to open discretionary commodity trading accounts with Merrill Lynch and for the broker's subsequent mismanagement of those accounts.

Specifically, plaintiffs allege that the accounts constitute investment contracts under federal law, and that Merrill Lynch violated Section 5 and Section 12(2) of the Securities Act by failing to file a registration statement before making an offer and sale of a security. Plaintiffs also assert that defendant made untrue statements of material fact, omitted to state material facts necessary to make the statements not misleading, and employed a device, scheme, or artifice which operated as a fraud upon plaintiffs, all in violation of Rule 10b-5, § 17 (a) of the Securities Act, § 6 of the Commodities Exchange Act, § 410(a)(2) of the Michigan Uniform Securities Act, and principles of common law. Plaintiffs further allege that defendant breached the commodity account agreement by: (1) failure to manage the accounts in a skillful and prudent manner; (2) failure to observe certain safeguards and stop-loss limits; and (3) failure to employ a scientific and comprehensive investment plan and instead, engaging in reckless and haphazard trading with the sole intention of generating large commissions.

The district court ruling presents several issues of first impression in this circuit. Initially, we must determine whether a discretionary trading account in commodity futures constitutes a "security" subject to the registration requirements and enforcement provisions of the federal securities laws. The court below determined the account was not a security and entered partial summary judgment against plaintiffs' se-

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lying action, as here, is legal in nature. *See Mansbach* v. *Prescott, Ball & Turben*, 598 F.2d 1017, 1022 (6th Cir. 1979); 9 Moore's Federal Practice ¶ 110.20[3].

curities claims, relying primarily on *Milnarik* v. *M-S Commodities, Inc.*, 457 F.2d 274 (7th Cir.), *cert. denied*, 409 U.S. 887 (1972). In *Milinarik* the Seventh Circuit, speaking through Mr. Justice Stevens (then Judge Stevens), held that a discretionary trading account in commodity futures is not a security because such accounts lack the "common enterprise" element required for an investment contract under *Securities Exchange Commission* v. *Howey*, 328 U.S. 293 (1946). We agree.

Further, we reject plaintiffs' contention that the account involved here, though not a security, should be treated as such because it was fraudulently misrepresented to include the essential elements of a common enterprise.

This appeal also presents substantial questions whether the district court should have stayed plaintiffs' other claims pending arbitration, and whether in all events the lawsuit is barred by a one-year limitation period provided for in the contract in question. Finally, for reasons set forth later, we have been obliged to consider, *sua sponte*, and have determined that an implied private right of action exists under the Commodity Exchange Act.[2]

I. FACTS

Plaintiffs, as customers of the broker-dealer defendant, Merrill Lynch, lost a substantial sum of money in the highly volatile and speculative futures market. These losses were allegedly sustained due to Merrill Lynch's mismanagement of plaintiffs' discretionary commodity accounts in a manner contrary to representations made when the contracts were made.

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[2] In *Kelley* v. *Carr*, —— F.2d —— (6th Cir. 1980) (decided March ——, 1980 File No. 78-1091/2), our court noted that the federal courts are in conflict over the continuing validity of a private implied right of action under the Commodity Exchange Act, following the 1974 amendments to the Act. The *Kelley* court, however, found it unnecessary to resolve the issue under the circumstances presented in that case. *Id.* at ——.

In 1973, plaintiffs opened several accounts for trading commodity futures in defendant's "Guided Commodities Account Program." In the written Customer Account Agreement, the parties agreed to submit any dispute under the contract to arbitration within one year after the accrual of such claim. As Merrill Lynch interprets the program, a customer deposits an amount he is prepared to risk in his own commodity trading account. Merrill Lynch further claims that although specific recommendations for purchase and sale are made by commodities specialists, the ultimate decision to act or not is made only upon the customer's direct order. However, plaintiffs have raised a question of fact with respect to that issue in the pleadings and Merrill Lynch has acknowledged that, for the purposes of this appeal only, the plaintiffs' commodity trading accounts must be deemed discretionary, with trading control in the hands of Merrill Lynch.

Plaintiffs allege that Merrill Lynch fradulently misrepresented how the account would be handled with respect to other accounts in the same program. They insist that the discretionary account was represented to involve several unique elements in that: (1) the program involved a specified number of investors who could not withdraw their capital for a minimum of 18 months; (2) the accounts were to be controlled by an individual trader who could direct buy/sell decisions on a broad basis and thereby control fluctuations in the market; (3) the capital availability and buying power generated by control over the group of accounts would create a multibuyer effect allowing the trader to buy as though he were buying five times greater the amount than if dealing with a separate account.

To support these contentions, plaintiffs state that after they opened the first account of $100,000 Merrill Lynch made all trading decisions and exercised complete control over plaintiffs' accounts. Initially, plaintiffs realized profits on the trading activity and at one point withdrew $101,007.80. Later, the

accounts declined in value and plaintiffs suffered excessive trading losses which they blame upon improper and excessive trading activities and a failure to observe the "stop loss" procedures represented to exist as part of the program. On several occasions, plaintiff John J. Curran requested that the accounts be closed and that plaintiffs be "cashed-out." On each occasion, except the final one (at which time plaintiffs' capital had been reduced to approximately $6,000), defendant either refused to follow his advice or convinced Curran that he was required to stay in the program for 18 months. In April, 1974, the defendants assented to plaintiffs' demands to "cash-out" the accounts. At that time plaintiffs assert that the accounts had declined in value approximately $175,000. Significantly, Merrill Lynch had in the meanwhile been paid $44,500 in commissions.

II.

A commodity future is a standardized contract for the purchase and sale of a fixed quantity of a commodity to be delivered in a specified future month at a price agreed upon when the contract is entered into. *See generally Bromberg, Securities Laws* § 4.6, at 82.181 (1975). Futures contracts are traded by futures commission merchants and floor brokers on national exchanges, or "contract markets," which are regulated by the Commodity Futures Trading Commission (CFTC).

Generally, a futures contract seller is characterized as being in a "short" position since he must deliver the commodity in accordance with the contract in order to receive the purchase price. The purchaser of a futures contract is labeled as holding a "long" position in that he must pay the contract price before receiving the commodity. Ordinarily, the number of trades far exceeds the number of actual deliveries since futures contracts are the subject of speculation by traders seeking to profit from their trading acumen, rather than from actually

delivering or receiving the commodity involved. As Judge Kinneary stated in *Berman* v. *Bache, Halsey, Stuart, Shields, Inc.*, 467 F. Supp. 311, 315-16 (S.D. Ohio 1979), "a commodities future contract is little more than a wager that the market price of a given commodity will change in a given direction by a specified future date." Normally, the trader's expectation of profit arises solely from speculative hope based upon his expertise in the market.

Although bare commodities are generally not considered securities, some courts have determined that an investment contract is formed when commodity accounts are managed by the seller or affiliate.[3] Typically, a customer trading in a discretionary commodity account gives the broker authority to buy and sell at the broker's discretion, without prior consultation with the customer. Discretionary accounts are more common for commodities where fast trading is required due to sharp movement in prices, a factor further magnified by the high leverage that results from generally low margin requirements.

While the underlying commodities themselves do not constitute securities, whether a discretionary commodity account constitutes an investment contract, and thus a security under the federal securities laws, is a current topic of dispute in the federal courts. The question is particularly difficult where there is no actual pooling of the customer's funds with those of other investors.

Whether a particular financial arrangement is considered an "investment contract,"[4] and therefore subject to the filing requirements of Section 5, Securities Act of 1933, and the

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[3] *See, e.g., Securities & Exchange Commission* v. *Continental Commodities Corp.*, 497 F.2d 516, 520 n.9 (5th Cir. 1971); *Glen-Arden Commodities, Inc.* v. *Constantino*, 493 F.2d 1027 (2d Cir. 1974); *Siuva, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 253 F. Supp. 359 (S.D.N.Y. 1966).

[4] Section 2(1) of the Securities Act of 1933, 15 U.S.C. § 77(b)(1), and Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C.

antifraud provisions of Section 10 and Rule 10b-5 of the Securities Exchange Act of 1934, is usually determined by measuring the arrangement against the requirements set forth in *Securities & Exchange Commission* v. *Howey, supra.* In *Howey,* the Supreme Court defined an investment contract as ". . . a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or third party. . . ." *Id.* at 298-99. It is universally recognized that the *Howey* test is comprised of three basic elements: (1) an investment of money, (2) in a common enterprise, with (3) profits to come solely from the efforts of others. Further, although the Supreme Court offered little guidance in defining these elements, it did note that the definition of a security,

> [E]mbodies a flexible rather than static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of money by others on the promise of profits.

Id. at 351. *See also United Housing Foundation, Inc.* v. *Forman,* 412 U.S. 837, 852 (1975).

The current debate usually focuses on whether a horizontal or a vertical relationship satisfies the "common enterprise" language of *Howey.* Plaintiffs assert that the common enterprise requirement is met by a vertical relationship, which

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78c(10) include the term "investment contract" in the definition of a security:

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificates for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. (Emphasis added.)

15 U.S.C. § 77b(1).

essentially is a one-on-one arrangement between the customer and broker. Horizontal relationships are those between an individual investor and the pool of other investors. In rendering summary judgment against plaintiffs' securities claims the district court applied the horizontal approach adopted in *Milnarik* v. *M-S Commodities, Inc., supra.*[5]

In *Milnarik*, Justice Stevens began his inquiry by observing that, in searching for the meaning and scope of the word "security," courts should disregard form in favor of substance and place the emphasis on economic reality. *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967). He observed that not "every conceivable arrangement that would fit a dictionary definition of an investment contract was intended to be included within the statutory definition of a security." *Id.* at 375-76. Justice Stevens interpreted *Securities & Exchange Commission* v. *Howey, supra*, as stressing the significance of the common enterprise element in determining whether particular investment contracts are securities. The original complaint in *Milnarik* alleged a discretionary arrangement remarkably similar to the relationship here. The court noted, however, that "the success or failure of those other [customer's] contracts had no direct impact on the profitability of plaintiffs' contract. [The broker's] various customers were represented by a common agent, but they were not joint participants in the same investment enterprise." *Id.* at 276. The significance of this finding is found in *Milnarik's* adoption of the district court's further determination that:

> In essence, this contract creates an agency-for-hire rather than constituting the sale of a unit of a larger en-

[5] For cases adopting the horizontal commonality approach, *see also, Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96 (7th Cir. 1977) (reaffirms *Milnarik*); *Wasnowic* v. *Chicago Board of Trade*, 352 F. Supp. 1066 (M.D. Pa. 1972), *aff'd without opinion*, 491 F.2d 752 (3rd Cir.), *cert. denied*, 416 U.S. 949 (1974); *Berman* v. *Bache, Halsey, Stuart, Shields Co.*, 467 F. Supp. 311 (S.D. Ohio 1979); *Arnold* v. *Bache & Co.*, 377 F. Supp. 61 (M.D. Pa. 1973); *Stuckey* v. *du Pont Glore Forgan, Inc.*, 59 F.R.D. 129, 131 (N.D. Cal. 1973).

> terprise. No matter how many different persons Nelson became an agent for under similar or even identical discretionary contracts, his relationship with each would remain as that of agent and principal. Each contract creating this relationship is unitary in nature and each will be a success or failure without regard to the others. Some may show a profit, some a loss, but they are independent of each other. No matter how many discretionary trading accounts Nelson may have had with other principals, the "security" "issued" to the plaintiffs, their discretionary trading account, could not be offered to anyone else. Although this Court recognizes that the registration requirements of Section 5 are for the protection of the public and that any exemption therefrom must be strictly construed against one claiming it, Securities and Exchange Commission v. Ralston Purine Co., [346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494]; Securities and Exchange Commission v. Culpepper, 270 F.2d 241 (2d Cir. 1959), the unitary nature of the contract here involved is not overcome even when the transaction is viewed most strongly against the defendants.

Id. at 277.

We reject plaintiffs' assertion that a pooling of investors' interests is not essential to a finding of common enterprise and hold that Justice Stevens' reasoning in *Milnarik* best comports with the language of *Howey* since the agreement entered into here was solely between plaintiffs as investors, and Merrill Lynch as broker, and it did not include a "common enterprise" element. Therefore, we conclude the district court had no jurisdiction under the federal securities laws and properly dismissed those claims for failure to state a cause of action.

By adopting *Milnarik*, we necessarily reject the vertical commonality approach primarily championed by the Fifth Circuit's decision in *Securities & Exchange Commission* v. *Continental Commodities Corp.*, 497 F.2d 516 (5th Cir. 1974).

In *Continental Commodities*, the district court followed the Seventh Circuit's reasoning in *Milnarik, supra*, primarily because each individual invested in different accounts and the investors had no expectation that they would share in a common fund comprised of the return on their investments.[6] The Fifth Circuit, however, refused to adopt the *Milnarik* approach and emphasized its view that a pro rata sharing of profits is not critical to a finding of commonality. Rather, the court preferred a resilient standard which would comport with the remedial purposes of the Securities Act of 1933 and the Securities Exchange Act of 1934. The court applied a test which the Ninth Circuit formulated to deal with the various pyramid-type investment schemes challenged in the courts as securities: a "common enterprise is one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties." *Securities & Exchange Commission* v. *Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir. 1974), *quoting Securities & Exchange Commission* v. *Glen W. Turner Enterprises*, 474 F.2d 476, 482 n. 7 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973).[7] Further, the court expressed the notion

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[6] It is interesting to note that the SEC had argued unsuccessfully before the district court in *Continental Commodities, supra*, that "trading in discretionary commodities accounts engaged in by Continental Commodities fell within the ambit of the term security, as defined by the Securities Act of 1933 and the Securities Exchange Act of 1934." 497 F.2d at 520.

[7] In *Brodt* v. *Bache & Co., Inc.*, 595 F.2d 459 (9th Cir. 1979), the Ninth Circuit recognized its prevailing definition of "common enterprise" as one in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third persons. However, the court noted its inconsistency with *Milnarik*'s strict pooling requirement for discretionary commodity accounts. The *Brodt* court then distinguished a discretionary commodity account from its general test by stating:

> [I]n the instant case, the investor's return, while specifically determined by the commodities market, is also clearly affected by the expertise of the person doing the trading. . . . the success or failure of Bache as a brokerage house does not correlate with individual investor profit or loss. On the contrary, Bache could reap large commissions for itself and be characterized as suc-

that "the critical factor is not the similitude or coincidence of investor input, but rather the uniformity of impact of the promoter's efforts." 497 F.2d at 478.

In *Continental Commodities* the Fifth Circuit vigorously criticized Milnarik's elevation of the pooling ingredient to exalted status and held that "the critical inquiry is confined to whether the fortuity of the investments collectively is essentially dependent upon promoter expertise. . . . That it may bear more productive fruits in the case of some options than it does in others should not vitiate the essential fact that the success of the trading enterprise as a whole and customer investments individually is contingent upon the sagacious investment counselling of Continental Commodities." *Id.* at 522.[8] Although this approach has attracted some support,[9] we believe that no horizontal common enterprise can exist unless there also exists between discretionary account customers

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cessful, while the individual accounts could be wiped out. Here, strong efforts by Bache will not guarantee a return nor will Bache's success necessarily mean a corresponding success for Brodt. Weak efforts or failure by Bache will deprive Brodt of potential gains but will not necessarily mean that he will suffer serious losses. Thus, since there is no direct correlation on either the success or failure side, we hold that there is no common enterprise between Bache and Brodt.

Id. at 461. Specifically, *Brodt* concluded that "merely furnishing investment counsel to another for a commission, even when done by way of a discretionary commodities account, does not amount to a common enterprise." *Id.* at 462.

[8] *See also Merrill Lynch, Pierce, Fenner & Smith* v. *Goldman*, 593 F.2d 129 (8th Cir.), *cert. denied*, —— U.S. ——, 100 S.Ct. 76 (1979); *Moody* v. *Bache & Co.*, 570 F.2d 523 (5th Cir. 1978); *Booth* v. *Peavey Co. Commodities Services*, 430 F.2d 132 (8th Cir. 1970) (without explanation the court found a cause of action lies for churning a commodities account under the securities laws).

[9] *See Commercial Iron & Metal Co.* v. *Bache & Co.*, 478 F.2d 30 (10th Cir. 1973), *cert. denied*, —— U.S. ——, 99 S.Ct. 1229 (1979) (dictum); *Booth* v. *Peavey Co. Commodities Services*, 430 F.2d 132, 133 (8th Cir. 1970) (prior to *Milnarik*); *Marshall* v. *Lamson Bros. & Co.*, 368 F.Supp. 486 (S.D. Iowa 1974) (emphasis on "pooling" of funds in *Milnarik*-sense is too strict or literal limitation on definition of "investment contract"); *Johnson* v. *Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764 (S.D.N.Y. 1972); *Berman* v. *Orimex Trading, Inc.*, 291 F. Supp. 701 (S.D.N.Y. 1968); *Mahen* v. *Reynolds & Co.*, 282 F. Supp. 423 (S.D.N.Y. 1968). *See also Consolo* v. *Hornblower &*

themselves some relationship which ties the fortunes of each investor to the success of the overall venture. Thus in our view the finding of a vertical common enterprise based solely on the relationship between promoter and investor is inconsistent with *Howey*.

Further support for *Milnarik's* rationale is found in *Berman* v. *Bache, Halsey, Stuart, Shields, Inc.*, 467 F. Supp. 311, 315-16 (S.D. Ohio 1979), where Judge Kinneary observed that:

> a finding of a common enterprise based solely upon the fact of entrustment by a single principal of money to an agent effectively excises the common enterprise requirement of *Howey*. The test would simply require (1) the investment of capital (2) with the expectation of profit through the efforts of others, for nothing more is involved in a single discretionary trading account. Although the precise meaning of the phrase "common enterprise" is far from clear, nowhere in *Howey* or later Supreme Court decisions is it intimated that that phrase is somehow redundant of other elements of the definition of a security.

Id. at 319.

III.

Even though we conclude that a discretionary commodity account is not a security, plaintiffs still claim the district court erred in dismissing the securities claims because while a "common enterprise" was not shown to exist, it was nonetheless fraudulently promised. In short, plaintiffs make the

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Weeks-Hemphill, Noyes, Inc., 436 F. Supp. 447 (N.D. Ohio 1976), where the court determined that a non-discretionary trading account in a commodities future was not an investment contract under the securities laws. However, in defining what is required to find an investment contract the *Consolo* court stated that a contract situation involving only two persons, i.e., the investor and his stock broker, does not admit of the common enterprise which is essential to the existence of an investment contract. *Id.* at 452.

interesting argument that the unfulfilled and fraudulent promise of a "common enterprise" with other Merrill Lynch customers itself brings the actual agreement made within the definition of a "security" and hence confers jurisdiction under the federal securities laws. Under such a circumstance, they urge it was improper for the district court to have entered summary judgment under Rule 56 because the deposition and affidavits submitted by the parties in connection with the motion for summary judgment raise a fact question of whether a "common enterprise" existed.[10]

We have earlier noted that the facts here are virtually identical to those in *Milnarik, supra*. One significant exception, however, is that the *Milnarik* court did not deal with the situation where the account is claimed to involve a pooling of funds, whereas in this case the plaintiffs allege that such misrepresentation occurred. The *Milnarik* court stated:

> This characteristic of common enterprise is completely lacking in the present case. Even assuming that Nelson in fact solicited and collected money from numerous parties, *no allegations are made that a common enterprise existed comprised of all people possessing discretionary account contracts with him. No claim is made that Nelson traded in a uniform manner for each of these accounts. Even if he had so uniformly traded, no pooling of funds for a common purpose is alleged.* Nelson was apparently simply an agent for a number of separate and distinct principals, the plaintiffs being one such principal. The plaintiffs in no way can be viewed as having invested in a common enterprise with other suppliers of venture capital.

Id. at 278. (emphasis added).

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[10] Upon summary judgment the inferences to be drawn from the underlying facts contained in supplemental materials must be viewed in a light most favorable to the party opposing the motion, *United States* v. *Diebold*, 369 U.S. 654, 655 (1962), and facts which are

The evidentiary matter before the district court included a deposition of Lawrence McMann, a Merrill Lynch customer account executive, and a counter affidavit of James Olin, Manager of a Detroit-area Merrill Lynch office. Olin stated that regardless of what plaintiffs may have been told, their account was handled independently of others involved in the program, and was never used in a manner that would suggest a common enterprise with the companion accounts. McMann testified, however, that although the account may have been handled as suggested by Olin, the Currans were given a different description of the account. Essentially, McMann stated that the account offered to the Currans was unique: the trader acted as controller of a group of accounts thus allowing him to make buy/sell decisions on a broader basis and thereby control fluctuations in the market. This control was represented as a trading capability five times greater than for a separate account.

We do not view this tempting expectancy as elevating the trading account to the full dignity of a security. Essentially it remained an agency for hire. It is true that plaintiffs may have hoped that defendant's control over a number of accounts would increase the agent's clout in the market. The fact remains, however, that the plaintiffs always understood that their return would be based on a one-to-one vertical relationship with the trader. They knew there was no contractual tie to other accounts.

IV.

Merrill Lynch asserted in the district court that plaintiffs' action was time-barred because the one year limitation period agreed upon in writing by the parties expired before the complaint was filed. The "Commodity Account Agreement"

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asserted, if supported by evidentiary material, must be accepted as true. *Day v. United Auto Aerospace Agric. Workers*, 466 F.2d 83 (6th Cir. 1972).

provided for submission of all disputes to arbitration within one year after the cause of action accrued.[11]

The accounts were opened April 5, 1973, and August 20, 1973. Plaintiffs claimed that they could not reasonably have known that defendant's representations were false until April, 1974. Judge Thornton, however, declined to rule on Merrill Lynch's claim that the action accrued more than one year prior to the April 5, 1976 filing of the complaint.

Merrill Lynch argues that absent a controlling statute to the contrary, a provision in a contract may validly limit the time for bringing an action for breach of contract to a period less than that prescribed in the general statute of limitations, at least if the shorter period is reasonable. *See, e.g., Order of United Commercial Travelers of America* v. *Wolfe*, 331 U.S. 586, 608 (1947).

Plaintiffs, however, assert that the one year limitation provision is tied to the arbitration clause in their discretionary trading account agreement, and that if arbitration is impermissible, the one year limitation also dies with it.[12] We agree.

V.

Plaintiffs assert that arbitration is not a favored remedy with respect to commodity futures brokerage transactions, citing statutory and administrative limitations upon the enforcement of an agreement to arbitrate. Specifically, Section

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[11] "Arbitration must be commenced within one year after the cause of action accrued by service upon the other of a written demand for arbitration or a written notice of intention to arbitrate, naming therein the arbitration tribunal."

[12] Plaintiffs' also assert that the Supreme Court in *Wilko* v. *Swan*, 346 U.S. 427 (1953), determined that an agreement to arbitrate cannot preclude an aggrieved purchaser of a "security" from seeking a judicial remedy under section 14 of the Securities Act of 1933. Further, the *Wilko* principle has been held equally applicable to claims under the Securities Exchange Act of 1934. However, due to our finding that the discretionary commodity account involved in this case is not a security, this argument is inapplicable.

5a of the Commodity Exchange Act, 7 U.S.C. § 7a(11), as amended by the Commodity Futures Trading Commission Act of 1974, P.L. 93463, 88 Stat. 1389, effective April 21, 1975, provides that each contract market is required to:

> (11) provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to a registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof; *Provided*, That (i) the use of such procedure by a customer shall be *voluntary*, (ii) the procedure shall *not be applicable to any claim in excess of* $15,000, (iii) the procedure shall not result in any compulsory payment except as agreed upon between the parties.

(Emphasis added).

In 1976, the CFTC adopted regulations under Section 7a (11) providing that no pre-dispute arbitration agreement may be enforced unless the agreement is contained in a separate document executed by the customer and contains adequate warnings in large print.[13] 17 C.F.R. § 180.1 *et seq.* (1976).

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[13] 17 C.F.R. § 180.3 states:

Voluntary procedure and compulsory payments.

(a) The use by customers of the dispute settlement procedures established by contract markets pursuant to the Act or this Part or of the arbitration or other dispute settlement procedures specified in an agreement under paragraph (b)(3) of this section shall be voluntary. The procedures so established shall prohibit any agreement or understanding pursuant to which customers of members of the contract market agree to submit claims or grievances for settlement under said procedures prior to the time when the claim or grievance arose, except in accordance with paragraph (b) of this section.

(b) No futures commission merchant, floor broker or associated person shall enter into any agreement or understanding with a customer in which the customer agrees, prior to the time the claim or grievance arises, to submit such claim or grievance to any settlement procedure except as follows:

(1) Signing the agreement must not be made a condition for the customer to utilize the services offered by the future commission merchant, floor broker or associated person;

Although the cause of action here arose before the effective date of the CFTC Act, plaintiffs argue that the Act's limitation upon arbitration should be retroactively applied. Plaintiffs urge that retroactive application is justified because the agreement here is an adhesion contract, forced upon plaintiffs and other like customers through unequal bargaining power and does not comply with the requirements of Section 180.3.

For its part, Merrill Lynch argues that the clause including the agreed limitation period is enforceable and that therefore the entire case should have been dismissed in the district

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(2) If the agreement is contained as a clause or clauses of a broader agreement, the customer must separately endorse the clause or clauses containing the cautionary language and other provisions specified in this section;

(3) The agreement may not require the customer to waive the right to seek reparations under section 14 of the Act and Part 12 of these regulations. Accordingly, the customer must be advised in writing that he or she may seek reparations under section 14 of the Act by an election made within 45 days after the futures commission merchant, floor broker or associated person notifies the customer that arbitration will be demanded under the agreement. This notice must be given at the time when the futures commission merchant, floor broker or associated person notifies the customer of an intention to arbitrate. The customer must also be advised that if he or she seeks reparations under section 14 of the Act and the Commission declines to institute reparation proceedings, the claim or grievance will be subject to the preexisting arbitration agreement and must also be advised that aspects of the claims or grievances that are not subject to the reparations procedure (i.e. do not constitute a violation of the Act or rules thereunder) may be required to be submitted to the arbitration or other dispute settlement procedure set forth in the preexisting arbitration agreement.

(4) The customer agreement must contain cautionary language, printed in large boldface type, to the following effect:

WHILE THE COMMODITY FUTURES TRADING COMMISSION (CFTC) RECOGNIZES THE BENEFITS OF SETTLING DISPUTES BY ARBITRATION, IT REQUIRES THAT YOUR CONSENT TO SUCH AN AGREEMENT BE VOLUNTARY. YOU NEED NOT SIGN THIS AGREEMENT TO OPEN AN ACCOUNT WITH [name]. See 17 CFR 180.1-180.6.

BY SIGNING THIS AGREEMENT, YOU MAY BE WAIVING YOUR RIGHT TO SUE IN A COURT OF LAW, BUT YOU ARE NOT WAIVING YOUR RIGHT TO ELECT AT A LATER DATE TO PROCEED PURSUANT TO SECTION 14 OF THE COM-

court. Merrill Lynch contends that neither in their briefs nor in their argument to the district court did plaintiffs argue that CFTC Regulation § 180.3, 17 C.F.R. § 180.3, could or should be applied retroactively. That regulation did not become effective until November 29, 1976, months after the case had been briefed and argued to the district court. Therefore, we are urged to disregard this argument because it is raised for the first time on appeal. *See Bannert* v. *American Can Co.*, 525 F.2d 104 (6th Cir.), *cert. denied*, 426 U.S. 942 (1975); *Schneider* v. *Electric Auto-Lite Co.*, 456 F.2d 366, 375 (6th Cir. 1972); *Cashner* v. *United States Steel Corp.*, 327 F.2d 533 (6th Cir. 1964) (court refused to consider issue not raised until a supplemental appellate brief was filed). The Supreme

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MODITY EXCHANGE ACT TO SEEK DAMAGES SUSTAINED AS A RESULT OF A VIOLATION OF THE ACT. IN THE EVENT A DISPUTE ARISES, YOU WILL BE NOTIFIED IF [name] INTENDS TO SUBMIT THE DISPUTE TO ARBITRATION. IF YOU BELIEVE A VIOLATION OF THE COMMODITY EXCHANGE ACT IS INVOLVED AND IF YOU PREFER TO REQUEST A SECTION 14 "REPARATIONS" PROCEEDING BEFORE THE CFTC, YOU WILL STILL HAVE 45 DAYS IN WHICH TO MAKE THAT ELECTION.

(5) If the agreement specifies a forum for settlement other than a procedure established pursuant to section 5a(11) of the Act or this Part, the procedures of such forum must comply with the requirements of § 180.5.

(c) The procedure established by a contract market pursuant to section 5a(11) of the Act or this Part may require parties utilizing such procedure to agree, under applicable state law, submission agreement or otherwise, to be bound by an award rendered in the procedure, provided that the agreement to submit the claim or grievance to the procedure was made in accordance with paragraph (b) of this section or that the agreement to submit the claim or grievance was made after the claim or grievance arose. Any award so rendered shall be enforceable in accordance with applicable law.

(d) The procedure established by a contract market pursuant to the Act or this Part shall not establish any unreasonably short limitation period foreclosing submission of customers' claim or grievances or counterclaims (permitted by § 180.4 or this Part) by contract market members or employees thereof.

(7 U.S.C. 7a(11), 12a (Supp. V, 1975))

[41 FR 42946, Sept. 29, 1976, as amended at 42 FR 3433, Jan. 18, 1977]

Court, however, in *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941), stated:

> There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.

In their supplemental brief, plaintiffs assert that *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith*, 567 F.2d 1174 (2d Cir. 1977), supports the retroactive application of CFTC Reg. § 180.3 to bar arbitration here, and in so doing, also negates the one year limitation period written into it. In *Ames*, plaintiff signed the same standard form Merrill Lynch agreement as involved in this case. The plaintiff opposed a stay of arbitration on the ground that 17 C.F.R. § 180.3, which became effective on November 29, 1976, after the agreement was entered into, should be applied retroactively to render the arbitration agreement null and void. The Second Circuit agreed that the CFTC intended section 180.3 to be given retroactive effect and further observed that:

> A court must apply the law as it exists at the time of its decision, even where the law has changed during the pendency of the action, unless the statute or legislative history reveals an intention of prospective application only, or retroactive application would lead to "manifest injustice." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). In applying this principle to the instant case, we are called upon to determine: (1) whether the Commission had the authority to apply the provisions of § 180.3 to all arbitration agreements; (2) whether the Commission intended the application of the regulation to arbitration agreements antedating the regulation; and (3) whether, given the authority and intention to make the regulation effective as to antedated agreements, the particular circum-

> stance that the *dispute* arose before the effective date of the regulation nevertheless precludes its application.

Id. at 1177.

Before making its determination, the *Ames* court traced the evolution of Section 180.3. The Commodity Exchange Act, 7 U.S.C. § 7a(11), required only that each contract market provide a "fair and equitable procedure through arbitration or otherwise" for settlement of claims up to $15,000, and that the use of such procedure be voluntary on the part of the customer. Neither arbitration of claims over $15,000 nor arbitration outside the contract market were mentioned in the Act. The Commission, however, determined that arbitration outside the literal scope of the Act should be regulated, and under provisions in the Act giving the Commission authority "to make and promulgate such rules and regulations as are necessary to effectuate any of the provisions or to accomplish any of the purposes of the act," 7 U.S.C. § 12a(5), the Commission promulgated section 180.3.

Initial proposals submitted by the Commission sought to bar any agreement to arbitrate future disputes, but provided that grievances arising out of agreements actually entered into prior to the adoption of the regulations should be exempted. Later, the Commission decided that pre-dispute agreements would be tolerated, but only under conditions designed to insure that arbitration was truly voluntary. Also, the exemption for agreements antedating the regulation was withdrawn. As stated by the *Ames* court, "[i]nstead, the thrust was to include even pre-existing arbitration agreements in the new order of things." *Id.* at 1178. Therefore, in making the final regulation effective on November 29, 1976, the Commission announced that "on the effective date of proposed § 180.3(b), all pre-dispute arbitration agreements that do not satisfy the conditions set forth in the proposed rule will be null and void, including those heretofore signed by customers." 41 Fed. Reg. 42,944 (Sept. 29, 1976). The announcement made no mention

of the treatment to be accorded disputes already in existence. On this basis, the *Ames* court held that "§ 180.3 fairly read should apply to all arbitration agreements existing at the effective date of the regulation." *Id.* at 1179.[14] *See also Tamari* v. *Bache & Co. (Lebanon) S.A.L.*, 565 F.2d 1194 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978) (Swygert, J. dissenting); *Rothberg* v. *Loeb, Rhoades & Co.*, 445 F. Supp. 1336 (S.D.N.Y. 1978); *Milani* v. *Conticommodity Services, Inc.*, 462 F. Supp. 405, 406-07 (N.D. Cal. 1976).

The retroactive effect of an alteration in a regulatory scheme generally depends upon whether it affects litigation at a point which causes a result so unfair and inequitable that it is unconstitutional. Plaintiffs here sought equitable relief from the arbitration clause in their customer commodity account agreement at an early stage of the litigation, and no surprise or other unfairness is apparent upon the record. Under these circumstances we do not find that retroactive application of Regulation § 180.3 would result in manifest injustice.

Further, we note that the plaintiff in *Ames* appealed from a district court order compelling arbitration and staying trial of his action, and therefore, sought equitable relief from the effect of a similar arbitration agreement at the same stage of the proceedings as the plaintiffs in the instant case.[15] In support of its result, the *Ames* court stated:

> Shortly after its creation, in 1975, the Commission undertook an examination of the use of arbitration in the

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[14] Judge Meskill issued a vigorous dissent to the *Ames* majority, noting in part that the Commodity Futures Trading Commission, as amici, explained "that its intent to reach pre-existing agreements did not extend to cases where a dispute had already arisen at the time the regulation was adopted." 567 F.2d at 1181. Apparently Judge Meskill agreed with the basic portent of the regulation but thought that application to disputes already in existence was extremely unfair. He perceived no problems in allowing retroactive effect "to the extent necessary to bring about an immediate change in existing contracts without unnecessarily cutting off accrued rights." *Id.* at 1182-83.

[15] We note that in *Arkoosh* v. *Dean Witter & Co.* 571 F.2d 437 (8th Cir. 1978), plaintiff contended that section 180.3 rendered invalid

futures industry. It learned that arbitration was frequently conducted not under the auspices of the contract markets regulated by the Commission but through arbitration sponsored by the New York Stock Exchange or other securities-oriented organizations. It also became apparent that in many cases arbitration was not undertaken voluntarily by customers, but that customers were compelled to agree to pre-dispute arbitration clauses as a precondition to doing business. Indeed, this practice was found to be so prevalent that a customer might effectively be frozen out of the futures market if he refused to execute a predispute agreement. 41 Fed.Reg. 27,526 (July 2, 1976); 41 Fed.Reg. 42,945 (Sept. 29, 1976).

The Commission received written comments and took oral testimony on March 5, 1976. At this hearing conducted by the Commission, representatives both of Merrill Lynch and Shearson Hayden Stone conceded that a customer could not do futures business with the firm if he refused to sign a predispute arbitration agreement. Commodity Futures Trading Comm'n, *Oral Hearing on Arbitration and Other Dispute Settlement Procedures* 32-34, 37, 82-98. (March 5, 1976); see generally 41 Fed.Reg. 42,945 (Sept. 29, 1976).

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the arbitration clause in his customer agreement. The claim, however, was not made until after the district court had issued a stay of arbitration, and an arbitration award in defendant's favor had been granted. The *Arkoosh* court recognized the holding in *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1179 (2d Cir. 1977), and in fact concurred by stating: "[t]he regulation voided all existing pre-dispute arbitration agreements in contracts for the purchase of commodities unless certain conditions are met." *Id.* at 438. Further, the *Arkoosh* court recognized that generally "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice . . . ." 571 F.2d at 438. (citations deleted). Within this context, the Eighth Circuit noted the district court's ruling that the chronological sequence demonstrated that plaintiff had ample time after the effective date of Section 180.3, and before the submission to arbitration, to urge the Court to reconsider its interpretation of the Customer Agreement. The defendant, having obtained the arbitration award, would suffer substantial injustice if the case was reopened, since plaintiff's assertion of his rights under the new regulation was untimely. Otherwise, the plaintiff could play it both ways, and seek relief to have arbitration set aside only if an unfavorable award is ordered.

Id. at 1178. In response to its fact-finding, the Commission, in announcing the effective date of the regulation, reiterated the nullity of all pre-dispute arbitration agreements not complying with the conditions of Section 180.3 but did not mention any exemption for existing disputes. 41 Fed. Reg. 42,942-44 (Sept. 29, 1976). As further noted in *Ames*, "any such exemption would hardly conform to the notion, stated by the Commission itself, that customers who had entered into agreements before adoption of the regulation needed and were entitled to the protections of the rule no less than those customers who signed agreements after November 29, 1976." *Id.* at 1177.

Our determination that Section 180.3 should be retroactively applied to invalidate the arbitration agreement in this case compels the further conclusion that the one year limitation period provided for therein is also inapplicable. The one year limitation was expressly contingent upon the institution of arbitration proceedings and the language of the agreement nowhere extends to any residual and underlying court action which may otherwise exist.

Accordingly, the order compelling arbitration and staying this action with respect to plaintiffs' commodity claims must be reversed and remanded to the district court.

VI.

Merrill Lynch has acknowledged that it did not consider the partial summary judgment in its favor, from which this appeal is taken, to have extended to or to have affected in any way the plaintiffs' claims under the Commodity Exchange Act (CEA).[16] Nevertheless, affirmance of the partial sum-

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[16] We construe the order of dismissal entered by the district court to grant only the relief requested by defendant's motion to dismiss, which related only to those allegations of the complaint purporting to state claims under the Securities Act of 1933 and the Securities Exchange Act of 1934. However, we view the pleadings and allegations in plaintiffs' complaint purporting to state a claim under the Com-

mary judgment and consequent remand to the district court for proceedings on the balance of the case necessarily raises the further question whether the federal district court has jurisdiction to entertain the remaining claims arising under the Commodity Exchange Act.[17]

Although the CEA does not expressly provide for a private right of action to recover damages, an implied right of action was generally thought to exist prior to the 1974 amendment of the Act.[18] Consistent with this view, no issue concerning the continuing validity of the implied right of action was raised in the court below, nor in this appeal.[19] Nevertheless,

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modities Exchange Act, 7 U.S.C. § 1, *et seq.*, as unimpaired by the district court's order of dismissal as, indeed, are the pendent state claims.

[17] In *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364 (6th Cir. 1977), *cert. denied*, —— U.S. ——, 98 S.Ct. 2849 (1978), we recognized that a court of appeals should ordinarily limit its review of an interlocutory order to the narrow question of whether the district court abused its discretion and refrain from intruding into the merits of the case only to the extent necessary to decide that issue. We determined, however, that the rule is one of orderly judicial administration and not a limit on jurisdictional power. Therefore, it is generally recognized that a court possesses the jurisdictional power on the appeal of an interlocutory order under 28 U.S.C. § 1292(a)(1) to reach and decide other aspects of the order which would not be independently reviewable by interlocutory appeal. *Id.* at 1370. *See also Mansbach* v. *Prescott, Ball & Turben*, 598 F.2d 1017, 1022 (6th Cir. 1979) (interlocutory order staying a pending action submitted to arbitration is appealable under section 1292(a)(1) if the underlying action is legal in nature).

[18] *See, e.g., Deaktor* v. *L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113, 94 S.Ct. 466, 38 L.Ed. 2d 344 (1973) (anti-manipulation provision of 7 U.S.C. § 13b); *Booth* v. *Pearcy Co. Commodity Services*, 430 F.2d 132 (8th Cir. 1970) (7 U.S.C. § 6b anti-fraud provision); *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967) (§ 6b); *United Egg Producers* v. *Bauer International Corp.*, 311 F. Supp. 1375 (S.D.N.Y. 1970) (§ 13b); *McCurnin* v. *Kohlmeyer & Co.*, 340 F. Supp. 1338 (E.D. La. 1972) (§ 6b); *Johnson* v. *Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764 (S.D.N.Y. 1972) (§ 6b); *Arnold* v. *Bache & Co., Inc.*, 377 F. Supp. 61 (M.D. Penn. 1973) (§ 6b).

[19] Plaintiffs allege that this cause of action arose in 1974, prior to the amendment of the Commodity Exchange Act. At that time it was generally held that a private cause of action existed under the

to provide direction to the district court upon remand and to avoid further delay in this already protracted litigation, we review this issue and specifically agree that an implied private right of action survived the 1974 amendments to the Act.[20]

The original Commodity Exchange Act of 1936 established a scheme for regulating trading in agricultural commodities futures based primarily on the concept of self-regulation. The chief means of enforcement of the Act emanated from the Commission's regulations and the rules of each Exchange, to which the courts added an implied private right of action. The increasing effect of commodities trading on the nation's economy, and significant escalations in annual trading volume, also gave rise to increased instances of fraud and manipulation. By 1974, Congress became aware that the system of

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Act. *See* note 18, *supra*. In 1974 Congress amended the Commodity Exchange Act, 7 U.S.C. § 1, *et seq.*, effective in 1975, to create a comprehensive regulatory procedure for the processing of complaints within the newly-established Commodity Futures Trading Commission (CFTC). This action was filed on April 5, 1976. Since the amendment of the CEA the courts have adopted contrary views with regard to the continuing validity of the pre-1974 implied right of action. Although the parties have not raised this issue on appeal, it is well established that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974). *See also Cort* v. *Ash*, 422 U.S. 66, 74 (1975); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969); *Bush* v. *State Industries Co.*, 599 F.2d 780 (6th Cir. 1979); *Weisenberger* v. *Huecker*, 593 F.2d 49 (6th Cir.), *cert. denied*, —— U.S. ——, 100 S.Ct. 170 (1979).

[20] In determining to proceed to the merits of this issue we recognize that in *Burks* v. *Lasker*, —— U.S. ——, 99 S.Ct. 1831, 1836 n. 5 (1979), the Supreme Court stated that "the question of whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided." Under circumstances where petitioners never disputed the existence of a private right of action and the question had not been put to a test, the decision in *Burks* offers a tempting invitation to bypass the issue. That course, in fact, was taken by the court in *Chipser* v. *Kohlmeyer & Co.*, 600 F.2d 1061, 1067 & n. 14 (5th Cir. 1979) when faced with the precise issue in this case. In *Chipser*, however, plaintiff had filed his complaint prior to the amendment of the Act and the court determined that the implied right of action issue should be addressed in the first instance by the district court. For purposes of this appeal, however, we find the more expedient route is to apply the law in effect at the time of our decision and to reach the implied right of action issue.

self-regulation had decreased in effectiveness and sought to buttress the enforcement of the CEA safeguards.[21]

In 1974 Congress amended the Commodity Exchange Act to create the Commodity Futures Trading Commission and established an administrative procedure under which violations of any rule, provision, or regulation of the Act could be redressed by the commencement of an administrative proceeding before the CFTC to recover reparations.[22] 7 U.S.C. § 18 (e). Reparations procedures may be initiated against futures commission merchants, floor brokers, commodity trading advisers and commodity pool operators, but not against the contract markets (exchanges). A judgment rendered in a reparations proceeding remains subject to appeal in the courts of appeal and is enforceable in the district courts. Additionally, the 1974 amendments grant the CFTC plenary power over futures commission merchants and contract markets.[23] The

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[21] In *Smith* v. *Groover*, 468 F.Supp. 105 (N.D. Ill. 1979), the court noted that Congress traced the inadequacies of the self-regulatory scheme to a number of factors:

> First, the enforcement staffs of commodities exchanges were unable to handle the vastly increased trading volume. H.R. Rep. No. 975, 93d Cong., 2d Sess. 46 (1974). Also, exchanges faced "growing difficulties . . . as a result of private plaintiffs seeking damages against self-regulatory activities of the markets." *Id.* at 48. Because an implied right of action could be brought against an exchange for failure to enforce its own rules, "attorneys to several boards of trade had been advising the boards to *reduce*—not expand exchange regulations designed to insure fair dealing." *Id.* at 46. Finally, an exchange simply lacked the necessary motivation and vigilance to effectively police its own members.

Id. at 109-10.

[22] Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389 (codified at 7 U.S.C. § 1 *et seq.*). The Act was further amended in 1978. Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865 (codified at 7 U.S.C. § 1 *et seq.*).

[23] The CFTC may suspend or revoke the registration of a futures commission merchant or the designation of a contract market. 7 U.S.C. § 7b, 9. The CFTC is authorized to issue cease and desist orders against contract markets, 7 U.S.C. § 13a, and may assess civil penalties of up to $100,000 against futures commission merchants and contract markets. 7 U.S.C. § 9, 13a. Perhaps most significantly, the CFTC or the Attorney General at the CFTC's request, may bring an action in federal district court against futures commission mer-

creation of the CFTC was to provide a "strong Federal regulatory umbrella" to support the regulatory efforts of the exchanges in curbing unfair trading practices by providing public enforcement measures at both the exchange and individual level. H.R. Rep. No. 975, 93d Cong., 2d Sess. 48 (1974).

Although the 1974 amendments represented a thorough revision of congressional regulation over the commodities futures trading industry, the Act did not speak to the continuing validity of the pre-existing private right of action. We believe the legislative history of the CFTC Act, however, indicates that Congress intended to extend further protection to the exchange customer, rather than to extinguish existing forms of protection. This observation is bolstered by the fact that Congress recognized self-regulation as a "commendable and noble concept and useful in such a complex atmosphere as that which surrounds futures trading." H.R. Rep. No. 975, 93d Cong., 2d Sess. 48 (1974).

In addition to providing a more comprehensive regulatory scheme, it appears that Congress was motivated by a desire to clarify the jurisdictional dispute developing between the Commodity Exchange Commission and the Securities Exchange Commission with regard to commodities regulation under section 2 of the 1974 Act. Congress, therefore, vested exclusive jurisdiction over commodities futures trading with the CFTC. 7 U.S.C. § 4a. *See Smith* v. *Groover*, 468 F. Supp. 105 (N.D. Ill. 1979); *R. J. Herely & Son Co.* v. *Stotler & Co.*, 466 F. Supp. 345 (N.D. Ill. 1979); *Hofmayer* v. *Dean Witter & Co.*, 459 F. Supp. 733 (N.D. Cal. 1978). The exclusive jurisdiction provision, however, should not be construed as extinguishing the pre-existing private right of action by implication since the thrust of the provision was to ensure that regulatory bodies

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chants and contract markets for a restraining order, an injunction or a writ of mandamus to compel compliance with the Act or its regulations devised by the CFTC. 7 U.S.C. § 13a-1. Further, the 1978 amendments to the CEA added a provision whereby a state may bring an action under the CEA on behalf of its citizens. 7 U.S.C. § 13a-2.

other than the CFTC would not interfere with the orderly development and enforcement of commodities regulation. H.R. Rep. No. 93-975, 93 Cong., 2d Sess. 28 (1974). This result is further shown by additional language in the Act in which Congress provided that "nothing in this section shall supersede or limit the jurisdiction conferred on the courts of the United States or any State". 7 U.S.C. § 2. Further, it is apparent from the following statement that Congress intended to supplement existing remedies, rather than create a substitute for them:

> The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is likewise *not intended to interfere with the courts in any way.* It is hoped that giving the Commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the right of final determination by the courts are expressly preserved. (emphasis added).

Remarks of Senator Talmadge, 120 Cong. Rec. 30459 (1974).[24]

The CFTC has interpreted the Act as implicitly authorizing private actions, and asserts that the right must be presumed to have survived the 1974 amendments unless Congress explicitly abolished the private remedy in enacting the amendments. Statement of CFTC Concerning Referral of Private Litigation Under the Doctrine of Primary Jurisdiction. 41 Fed. Reg. 18471 (May 5, 1976). *See also Smith* v. *Groover*, 468 F. Supp. 105 (N.D. Ill. 1979) (amicus brief submitted by CFTC).

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[24] In 1978, Congress further amended the CEA, P.L. 95-405 (Oct. 1, 1978), 7 U.S.C. § 1, *et seq.*, to expressly allow the states, through Attorneys General or security regulations, to initiate actions in federal district court for CEA violations. This section does not indicate that Congress intended to extinguish private rights of action but rather, was meant to buttress the regulatory power of the CFTC, which is unable to regulate all aspects of commodities trading effectively. *See also Jones* v. *B.C. Christopher & Co.*, 466 F. Supp. 213 (D. Kan. 1979).

The judicial canon of construction which allows the court to grant considerable deference to the interpretation of a statute by an agency charged with its administration also supports the conclusion that the 1974 act did not preclude a private right of action. *See United States* v. *Consumer Life Ins. Co.*, 430 U.S. 725, 752 (1977); *NLRB* v. *Boeing Co.*, 412 U.S. 67, 75 (1973). However, the Supreme Court indicated in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 41, n. 27 (1976), that the administrative deference rule is not applicable where the narrow legal issue is whether a cause of action should be implied in favor of a particular class of litigants by judicial interpretation. *See also National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 470 F. Supp. 1256 (S.D.N.Y. 1979).

We admit that a recognized private right of action need not be re-examined every time the statutory scheme from which it is implied is altered. Nevertheless case law since the 1974 amendments has raised at least some uncertainty as to the continued vitality of the implied right, especially when analyzed in light of *Cort* v. *Ash*, 422 U.S. 66 (1975).[25] *See also Smith* v. *Groover*, 468 F. Supp. 105, 112 (N.D. Ill. 1979).

The Supreme Court established a four-part test in *Cort* to determine whether Congress intended a private remedy to be implied from legislation which created enforceable rights but remained silent as to the form of remedy. Since the 1974

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[25] In response to these developments the courts have either: (1) presumed the continuing validity of the private remedy without taking into account *Cort* v. *Ash*, 422 U.S. 66 (1975), or the 1974 amendments. *See Ames* v. *Merrill Lynch, Pierce, Fenner & Smith*, 567 F.2d 1174, 1176 (2d Cir. 1977); *Case & Co.* v. *Board of Trade of City of Chicago*, 523 F.2d 355 (7th Cir. 1975); *Kelley* v. *Carr*, 442 F. Supp. 346 (W.D. Mi. 1977) *rev'd on other grounds*, —— F.2d —— (6th Cir. 1980); *E. F. Hutton & Co.* v. *Lewis*, 410 F. Supp. 416 (E.D. Mi. 1976); (2) determined that the 1974 amendments were intended to serve as a supplemental rather than a substitutionary remedy, and therefore permit plaintiffs to bring a direct cause of action in federal court without attempting to exhaust the administrative reparations remedy provided by Congress. *See, e.g., Smith* v. *Groover*, 468 F. Supp. 105 (N.D. Ill. 1979); *Jones* v. *B.C. Christopher & Co.*, 466 F. Supp. 213 (D. Kan. 1979); *R. J. Hereby & Son Co.* v. *Stotler & Co.*, 466 F. Supp. 345 (N.D. Ill. 1979); (3) held that while the 1974 amend-

amendments, the implied right of action inquiry has centered primarily on the issues of Congress' legislative intent in enacting the 1974 amendments and the consistency of the statutory scheme with the Commodity Exchange Act.

In *Cort* v. *Ash, supra,* the Court delineated four relevant factors to determine whether a private right of action may be implied under a federal statute:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78. *See also Transamerica Mortgage Advisors, Inc.* v. *Lewis,* — U.S. —, 48 U.S.L.W. 4001, 4002 (November 13, 1979); *Touche Ross & Co.* v. *Redington,* — U.S. —, 99 S. Ct. 2479 (1979); *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979); *Piper* v. *Chris-Craft Industries,* 430 U.S. 1, 37 (1976).

The first element is easily satisfied. Clearly investors in the commodities markets are within the class "for whose especial benefit the statute was enacted." The legislative history of

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ments did not extinguish the implied right of action previously recognized, a plaintiff must first exhaust his administrative remedies. *See Bartels* v. *International Commodities Corp.,* 435 F. Supp. 865 (D. Conn. 1977); *Consolo* v. *Hornblower & Weeks-Hemphill, Noyes, Inc.,* 436 F. Supp. 417 (N.D. Ohio 1976), or; (4) determined that the combination of the 1974 amendments and the decision in *Cort* v. *Ash, supra,* extinguished the private cause of action since the CEA as amended did not meet the four-part test of *Cort. See Berman* v. *Bache, Halsey, Stuart, Shields, Inc.,* 467 F. Supp. 311 (S.D. Ohio 1979); *National Super Spuds, Inc.* v. *New York Mercantile Exchange,* 470 F. Supp. 1256 (S.D.N.Y. 1979); *Fischer* v. *Rosenthal & Co.,* 481 F. Supp. 53 (N.D. Tex. 1979).

the 1974 amendments shows that the primary purpose was to protect against manipulation of markets and to protect individuals who desire to participate in futures market trading.[26] 7 U.S.C. § 6b. *See, e.g., Smith* v. *Groover*, 468 F. Supp. 105 (N.D. Ill. 1979); *Berman* v. *Bache, Halsey, Stuart, Shields, Inc.*, 467 F. Supp. 311, 322 (S.D. Ohio 1979); *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 470 F. Supp. 1256 (S.D.N.Y. 1979). *But see Liang* v. *Hunt*, 477 F. Supp. 891 (N.D. Ill. 1979) (distinguished claims involving excessive speculation and price manipulation in violation of statutory limits from fraud actions).

The second factor, whether there is any explicit or implicit indication of legislative intent to grant or deny a private right of action, also supports the implication of a private action under the CEA. The legislative history of the 1974 amendments indicates that Congress was aware of the fact that the federal courts had implied the existence of a private right of action under the CEA.[27] Further, the "exclusive jurisdiction"

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[26] See 120 Cong. Rec. Senate 30466 (1974) (remarks of Sen. Dole); 120 Cong. Rec. Senate 34998-99 (1974) (remarks of Sen. Clark). *See also Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1179 (2d Cir. 1977).

[27] Congress recognized that the "courts [had] implied a private remedy for individual litigants in the Commodity Exchange Act." Remarks of Rep. Poage, 119 Cong. Rec. 41333 (1973). In fact, the Senate Committee on Agriculture and Forestry inserted a proviso into the exclusive jurisdiction section, 2(a)(1), that, "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State." The proviso resulted from testimony warning that the cumulative effect of the reparation provision and the exclusive jurisdiction section might be interpreted as repealing the jurisdiction of the courts to hear private damage actions. Hearings on S. 2485, S. 2578, S. 2938 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry, 93d Cong., 2d Sess. pt. 1 at 205, pt. 3 at 737 (1974). *See also Smith* v. *Groover*, 468 F. Supp. 105, 114 (N.D. Ill. 1979).

Further, it is a rule of statutory construction that Congress is presumed to have been aware of existing constructions of statutes and does not intend to overrule them if the provision is re-enacted in substantially the same form. *Alabama Ass'n. of Ins. Agents* v. *Board of Governors of the Federal Reserve System*, 533 F.2d 224 (5th Cir. 1976); *Hofmayer* v. *Dean Witter & Co.*, 459 F. Supp. 733 (N.D. Cal. 1976).

provision of the CFTC, 7 U.S.C. § 2 (amended),[28] does not indicate an intention to abolish the pre-1974 implied right of action, as previously noted, particularly since Congress included in Section 2(a)(1) that "nothing in this section shall supersede or limit the jurisdiction conferred on the courts of the United States or any State." The Conference Committee which adopted the language offered by the Senate explained in its report that the purpose of the amendment was "to make clear that nothing in the Act would supersede or limit the jurisdiction presently conferred on courts of the United States or any State." 120 Cong. Rec. 34997 (October 10, 1974); 120 Cong. Rec. 34737 (October 9, 1974). Therefore, we believe that the reparations procedure established in the 1974 amendments, as construed by the relevant legislative history shows that Congress intended the administrative remedy to serve "as a supplement to, rather than a substitute for, the existing private right of action." *Smith* v. *Groover, supra,* 468 F. Supp. at 113-14. *But see National Super Spuds, supra,* 470 F. Supp. at 1260; *Berman, supra,* 467 F. Supp. at 322.[29]

The third element of *Cort*, whether the implication of a private right of action would be consistent with the underlying

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[28] 7 U.S.C. § 2 states, in part:

> That except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State.

[29] *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 470 F. Supp. 1256 (S.D.N.Y. 1979), and *Berman* v. *Bache, Halsey, Stuart, Shields, Inc.*, 467 F. Supp. 311, 322 (S.D. Ohio 1979), also held that the establishment of an extensive administrative reparations process and the plenary grant of disciplinary and regulatory power to the Commodity Futures Trading Commission evidenced a congressional intent to deny a private right of action under the Act, through application of the maxim "expressio unius est exclusio alterius"; the expression of one thing is the exclusion of another.

purposes of the Act is also met in this case. As stated in *Smith* v. *Groover*:

> [T]he continued existence of a private right of action for aggrieved investors is perfectly compatible with the language and purpose of the CFTCA. Affording injured commodities futures buyers a multiplicity of remedies against futures traders will deter the sort of manipulative pricing practices alleged to have been committed by defendants. As shown above, Congress intended the reparations proceedings in the CFTC to constitute an alternative to the more time-consuming, cumbersome, expensive and formal adjudication of private claims in federal or state courts. The availability of a variety of remedies thus harmonizes well with the Congressional intent to protect the public from fraud and price manipulation.
>
> Recent administrative interpretations of the CFTCA also demonstrate the compatibility of a private right of action with the purposes of the Act. The CFTC has consistently interpreted the reparations section as permitting commodity customers an election of forums in which to pursue their claims. *See* 41 Fed.Reg. 3994 (1976); 41 Fed.Reg. 18472 at n.5 (1976); *Stucki* v. *American Options Corp.*, CCH Comm.Fut.L. Rep. ¶ 20,559 at 22,283 (CFTC 1978). The CFTC will not even entertain a reparation claim if civil court litigation involving the same facts and parties has been instituted. 17 C.F.R. § 12.21(a)(7) (1977). We recognize that "... the consistent construction of a statute 'by the agency charged with its enforcement is entitled to great deference by the courts.'" *United States* v. *Consumer Life Insurance Co.*, 430 U.S. 725, 752, 97 S.Ct. 1440, 1454, 52 L.Ed.2d 4 (1977), quoting from *NLRB* v. *Boeing Co.*, 412 U.S. 67, 75, 93 S.Ct. 1952, 36 L.Ed.2d 752 (1973); *see also, Chemehuevi Tribe of Indians* v. *Federal Power Commission*, 420 U.S. 395, 409-10, 95 S.Ct. 1066, 43 L.Ed.2d 279 (1975).

468 F. Supp. at 115. *But see National Super Spuds, supra*, 470 F. Supp. at 1260; *Berman, supra*, 467 F. Supp. at 322-23.

The fourth factor, whether the implication of a private right would infringe on an area of state concern is not crucial here since *Cort* v. *Ash, supra,* at 84-85, indicates that a court should imply a private remedy when relegation to state law would frustrate the purpose of the federal statute. This factor favors the implication of a private right of action since the regulation of commodity futures trading is essentially a matter of federal concern.

Our analysis of the effect of the 1974 amendments to the Commodity Exchange Act, within the framework of *Cort* v. *Ash,* persuades us that the amendments did not impair the validity of the pre-existing implied private right of action. Rather, Congress appears to have armed aggrieved investors with a supplementary remedy in creating the reparations procedures to be followed under CFTC authority.

Finally our research persuades us that the primary jurisdiction doctrine should not be invoked here to compel exhaustion of the administrative reparations procedures before instituting a private action.[30]

The primary jurisdiction doctrine is intended to ensure that private suits will not interfere with the orderly development of precedent or exercise of discretion by an agency. The principal reason for invoking the doctrine in an action arising under the CEA would be to avoid interfering with the CFTC's administration of the regulatory scheme. The

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[30] The primary jurisdiction doctrine is a rule of judicial construction which permits a court, in exercise of its sound discretion, to defer to an administrative agency for the initial resolution of certain disputes. This doctrine is usually invoked when resolution of a dispute will require special skill or knowledge peculiar to a certain agency. *See United States* v. *Western Pac. R. Co.*, 352 U.S. 59 (1956); *Jones, supra,* at 222; *Hofmayer, supra,* at 738; *Shearson Hayden Stone, Inc.* v. *Lumber Merchants, Inc.*, 423 F. Supp. 559 (S.D. Fla. 1976). The courts have generally refused to apply the doctrine to fraud claims under the Commodity Exchange Act. *See, e.g., Smith* v. *Groover*, 468 F. Supp. 105 (N.D. Ill. 1979); *Hofmayer* v. *Dean Witter & Co.*, 459 F. Supp. 733 (N.D. Cal. 1978). *But See Bartels* v. *International Commodities Corp.*, 435 F. Supp. 865 (D. Conn. 1977); *Consolo* v. *Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F. Supp. 447 (N.D. Ohio 1976).

preservation of an implied right of action does not, of course, interfere with the rulemaking power conferred upon the CFTC by Congress or with the opportunity of the Commission to apply its expertise through that power to complement the orderly development of precedent and procedure.

In determining whether to invoke the primary jurisdiction doctrine the courts must balance the need for special expertise and the extent to which administrative relief is available. *Eluska* v. *Andrus*, 587 F.2d 996, 999 (9th Cir. 1978). In a case where the primary issues involve allegations of fraud rather than a complex manipulative scheme, the special expertise of the CFTC is not a prerequisite to a just resolution. The facts here are far different from those which prompted reversal and remand in *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973). There the district court of appeals had refused a stay of an action against the Chicago Mercantile Exchange charging antitrust and Commodity Exchange Act violations through manipulation of the futures market in fresh eggs. The stay was requested to afford the Commodity Exchange Commission an opportunity to determine whether the conduct under scrutiny violated the CEA or its own rules. The Supreme Court in *Deaktor* observed, as it had in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973), that the trial court "should avail itself of the abilities of the Commission to unravel the intricate and technical facts of the commodity industry and to arrive at some judgment as to whether the Exchange had conducted itself in compliance with the law." *Id.* at 115. It therefore observed that claims "should be routed in the first instance to the agency whose administrative functions appear to encompass adjudication of the kind of substantive claims made against the [defendant]." *Id.* at 115. *See also Jones* v. *B. C. Christopher & Co.*, 466 F. Supp. 213 (D. Kan. 1979). No such intricate and technical facts are involved here. On the contrary, the CFTC has itself noted that the application of primary jurisdiction is "rarely, if ever" appropriate for

claims within "private litigation seeking damages for alleged violations of provisions of the Act," and that "[t]he issues raised by a particular fraudulent scheme, however complicated, are entirely within the conventional ability of the courts." Fed. Reg. Doc. 76-12906 (May 3, 1976). *See also Jones, supra*, at 222-23; *Shearson Hayden Stone, Inc.* v. *Lumber Merchants, Inc.*, 423 F. Supp. 559 (S.D. Fla. 1976).

CONCLUSION

Judge Phillips' dissent accurately calls attention to a number of Supreme Court decisions which, we agree, indicate a tendency to be more restrictive in implying a private right of action. While we recognize potential merit in this view, especially in light of the comprehensive administrative scheme embodied in the 1974 amendments, we are not persuaded that Congress intended to extinguish the pre-existing private right of action which had been generally acknowledged to exist under the Act. *See* note 18, *supra*. What we have done here, in our view, is to preserve the general concept of a private right of action and to provide for its continuing development, not under the securities laws generally, but under those laws of Congress which are more particularly related to the commodities market. This approach provides greater sensitivity to the specialized concerns of that area of commercial life, appears consistent with congressional intent and also allows for the development of a private right of action similar to the valuable body of law that has grown under Section 10 of the Securities Exchange Act and Rule 10b-5. It is arguable, of course, that some particular actions or claims may require initial submission to the Commodity Futures Trading Commission under the primary jurisdiction doctrine. Suffice it to say, however, that such problems do not exist here and can be properly addressed as they arise, on a case-by-case basis.

Accordingly, the partial summary judgment entered by the district court denying plaintiffs' relief on their claims under

federal securities law is affirmed. However, that part of the order which stays plaintiffs' fraud claims under the Commodity Exchange Act is reversed and remanded to the district court for proceedings consistent with this opinion.

PHILLIPS, Senior Circuit Judge. (Concurring in part and dissenting in part.) I respectfully dissent from the holding of the majority that an implied private right of action exists under the Commodity Exchange Act. With this exception, I concur in the majority opinion.

My dissent on the implied right of action issue is based on the failure of Congress, when it amended the Act in 1974, to specify that it intended to continue to allow private damage actions despite its creation of an elaborate administrative reparations procedure. *See Transamerica Mortgage Advisors, Inc.* v. *Lewis*, —— U.S. ——, 48 U.S.L.W. 4001 (Nov. 13, 1979) (Congress' express provision of alternative means to enforce § 206 of the Investment Advisors Act of 1940 precludes implication of a private damage remedy thereunder); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975) (Securities Investor Protection Act's assignment to the SEC of "plenary authority" to supervise the SIPC precludes customers of failing broker-dealers from maintaining private suits to compel SIPC to act for their benefit); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974) (§ 307(a) of the Rail Passenger Service Act of 1970, which allows the Attorney General to file suits to force railroads to comply with the Act, negates any private cause of action to enforce compliance). *Cf. Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979) (no implied private damage remedy under § 17 (a) of the Securities Exchange Act of 1934); *Taylor* v. *Brighton Corp.*, —— F.2d —— (6th Cir. Feb. 14, 1980) (no implied private damage remedy under § 11(c) of OSHA); *Ryan* v. *Ohio Edison Co.*, 611 F.2d 1170 (6th Cir. 1979) (no

implied private right of action under the Bankruptcy Act to prevent creditors from using informal methods to collect discharged debts).

Justice Rehnquist, concurring in the decision of *Cannon* v. *University of Chicago*, 441 U.S. 677, 718 (1979), stated what I believe to be the guiding principle:

> Not only is it "far better" for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.

I would hold the plaintiffs have no implied private right of action under the amended Commodity Exchange Act. *See Fischer* v. *Rosenthal & Co.*, 481 F. Supp. 53 (N.D. Tex. 1979).

MEMORANDUM RE MOTION TO DISMISS AND STAY PROCEEDINGS

United States District Court
Eastern District of Michigan
Southern Division
(Filed Dec. 27, 1976)
Civ. No. 6-70683

J. J. Curran, et al., Plaintiffs, vs. Merrill Lynch, Pierce, Fenner and Smith, a Delaware Corp., Defendant.

In their Complaint herein plaintiffs allege that the amount in controversy is in excess of $10,000 and that jurisdiction is conferred on this Court by Section 27 of the Securities Exchange Act of 1934, by Section 22(a) of the Securities Act of 1933, by 28 U.S.C. § § 1331, 1332 and 1337 and by pendent jurisdiction. They also allege that the acts complained of occurred within this judicial district.

The Court has here for consideration defendant's Motion To Dismiss Or, In The Alternative, To Dismiss In Part And Stay Proceedings Pending Arbitration. This motion was argued before the Court and the parties have submitted substantial and thorough briefs. Since plaintiffs have submitted the deposition of one Lawrence McMann and defendants have submitted the affidavit of one James Olin, with supporting exhibits, the motion herein will be treated as one for summary judgment. Rule 12(b), F.R.Civ.P.

Plaintiffs, in their Reply Memorandum In Opposition To Motion To Dismiss And Stay Proceedings, filed August 25, 1976, set forth certain matters contained in the Complaint which are here recited for purposes of indicating the background against which this litigation is set:

During the year 1973, Plaintiffs opened several accounts with the Defendant brokerage firm, at least two of which were for the purpose of trading in commodity futures. The accounts were opened after numerous representations were made concerning Defendant's trading acumen and the profits which would inure to Plaintiffs as participants in Defendant's "Specialized Guided Account Trading Program" (hereinafter referred to as the "Program").

It is further alleged that as a condition to participation in the Program, which was then being offered by Defendant to persons across the country through telephone and face-to-face solicitations, Plaintiffs had to agree to all of the terms and conditions established by Defendant in connection with the Program. Among other things, Plaintiffs agreed to participate in the Program for at least eighteen (18) months and to follow all of the Defendant's trading "suggestions." Other aspects of the Program, as represented to Plaintiffs, were periodic reviews by the local Speculative Sales Department manager and specific stop loss procedures designed to limit the amount of capital which could be lost by Plaintiffs.

After the Program accounts were opened by Plaintiffs, Defendant made all trading decisions and exercised complete control over Plaintiff's accounts with complete reliance by Plaintiffs upon Defendants' actions and decisions. Contrary to the unsupported allegations set forth in Defendant's memorandum, Plaintiffs "never initiated or suggested any trade made by Defendant in said commodity accounts." (Complaint, paragraph 17). Accordingly, the

accounts were "discretionary accounts" as that term is defined and understood in the brokerage community and in numerous judicial decisions.

Plaintiffs' Complaint further sets forth that Defendant, in breach of the agreement between the parties and of the fiduciary duties owed to Plaintiffs, committed fraudulent, reckless and negligent acts motivated solely by self-interest in connection with Plaintiffs' accounts, resulting in significant financial damage to the Plaintiffs.

Analyzing the relationship between Plaintiffs and Defendant as described in the Complaint and in the deposition of Lawrence McMann, an employee of Defendant during the period at issue, it is readily apparent that the accounts maintained by Plaintiffs were not typical commodity trading accounts or even typical discretionary commodity accounts. By virtue of their participation in the Program, Plaintiffs had specialized commodity accounts quite unlike any ordinary account. For example, Plaintiffs, who were greatly concerned about their mounting losses, requested on several occasions that they be "cashed out" of their positions. In an ordinary account, their wishes would be promptly fullfilled but in the instant case *Defendant refused to follow Plaintiffs' instructions* because Plaintiffs had not remained in the Program for eighteen (18) months and "such action was not in accordance" with the Program (Complaint, paragraph 28). Furthermore, in an ordinary commodity account, the funds invested by the customer are segregated and utilized solely in connection with trades executed for his

account. In the course of his deposition, Mr. McMann testified that all funds received by Defendant from participants in the Program were transmitted to Defendants' New York office where these *funds were pooled and used by Defendant to engage in futures trading with the Program participants sharing pro rata in the contracts which were purchased or sold.* This pooling of interest or "common enterprise" aspect of the Program is another indication that these were no ordinary commodity accounts but rather constituted an opportunity for a unique form of deception.

In its Motion to Dismiss defendant moves:

> 1. That this action be dismissed pursuant to Rule 12(b)(6) Fed.R.Civ.P., for the reason that the limitation period agreed upon in writing by the parties expired prior to filing of the Complaint, or
>
> 2. That, in the alternative, the Court dismiss pursuant to Rule 12(b)(6) Fed.R.Civ.P., those allegations of the Complaint purporting to state claims under the Securities Act of 1933 and the Securities Exchange Act of 1934, to wit: Counts IV, V and VI of the Complaint, and
>
> 3. Stay proceedings of the remaining claims pending arbitration, pursuant to the written agreement of the parties and the Federal Arbitration Act, 9 U.S.C. § 3.

As to the first ground for its Motion to Dismiss, defendant's position is that the Commodity Accounts Agreements entered into between plaintiffs and defendant provided that all disputes be submitted to

arbitration and that such arbitration must be commenced within one year after the accrual of the cause of action. Defendant contends that the claims alleged by plaintiffs in their Complaint filed April 5, 1976 accrued more than one year prior to its being filed, and that the instant action is, therefore, time-barred. The accounts which are the subject of this lawsuit were opened with defendant on or about April 5, 1973 and August 20, 1973. According to the allegations in plaintiffs' Complaint plaintiffs discovered the alleged "false, fraudulent and deceitful nature of the representations as set forth herein and at that time, in April 1974, plaintiffs insisted the accounts be cashed out" (Compl. p. 9). Plaintiffs allege that they "did not know nor have any reasonable basis to know that the said representations were false, but believed and relied upon said representations as being true" (Compl. p. 9), until sometime in April 1974. On the basis of said allegations the Court will not at this posture of these proceedings determine that plaintiffs' action is time-barred.

As to the second ground of defendant's Motion to Dismiss, the defendant seeks dismissal of Counts IV, V and VI because they purport to state claims under the Securities Act of 1933 and the Securities Exchange Act of 1934, when in fact the contracts involved are not securities within the meaning of the Acts. The issue for determination here is whether or not plaintiffs' agreements/transactions with defendant involve securities. The purchase and sale of commodity futures contracts are the subject of the dealings between the parties. The term "security" as used in the Act is defined as follows:

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of

> indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorgainzation certificate or subscription, transferrable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. 15 U.S.C. § 77b(1).

The operative term in the above definition is "investment contract." If plaintiffs' agreements or accounts with defendant were investment contracts then a "security" situation existed and was subject to the two Acts and plaintiffs' cause of action is properly founded jurisdictionally on them, as to Counts IV, V and VI. Less simple is the determination of an investment contract. The parties hereto are in agreement and our research indicates that the Sixth Circuit has not had occasion to speak to this issue. Two Courts of Appeals have. They have reached opposite conclusions, both courts relying on the guidelines laid down by the Supreme Court in *S.E.C.* v. *Howey Co.*, 328 U.S. 293 (1946). The *Howey* case involved investments by customers in citrus acreage in Lake County, Florida. Customers were offered a land sales contract and a service contract. They received warranty deeds upon full payment on the purchase price. The service contract gave Howey-in-the-Hills Service, Inc. a leasehold interest and complete possession of the acreage. The service company was in charge of the

cultivation of the groves and of the harvesting and marketing of the crops. An allocation of the net profits was made based on a check made at the time of picking. With respect to this operation the requirements of the Securities Act of 1933 were not complied with. If the transaction involved was an investment contract, hence a security, then defendants were guilty of failing to comply with the statutory and administrative rules in making the offerings. The Court in *Howey* stated, at page 297:

> The legal issue in this case turns upon a determination of whether, under the circumstances, the land sales contract, the warranty deed and the service contract together constitute an "investment contract" within the meaning of § 2(1).

The Court further went on to say, at pages 298-299:

> By including an investment contract within the scope of § 2(1) of the Securities Act, Congress was using a term the meaning of which had been crystallized by this prior judicial interpretation. It is therefore reasonable to attach that meaning to the term as used by Congress, especially since such a definition is consistent with the statutory aims. In other words, an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. Such

> a definition necessarily underlies this Court's decision in S.E.C. v. *Joiner Corp.*, 320 U.S. 344, and has been enunciated and applied many times by lower federal courts. It permits the fulfillment of the statutory purpose of compelling full and fair disclosure relative to the issuance of "the many types of instruments that in our commercial world fall within the ordinary concept of a security." H.Rep.No. 85, 73d Cong., 1st Sess., p. 11. It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.

This tripartite test has been applied by those courts considering the question of whether an investment contract has been made by an investor. As to tests one and three, we think they must be deemed to be met in the circumstances of the transactions here. Plaintiffs invested large sums of money with defendant for the purpose of gaining the benefit of its expertise in the commodity trading market. They signed agreements giving defendant the power and authority to buy and sell for them. The parties are in disagreement as to whether plaintiffs did or did not have the right to direct/approve the transactions made by defendant in their accounts. Plaintiffs contend they had no say in the matter, while defendant says they did. Regardless of the resolution of such dispute we deem it undeterminative of the investment contract question. We think there can be little question that plaintiffs invested their money and were led to expect profits solely from the efforts of defendant.

The troublesome test of the tripartite guidelines is the second one, namely, that of a common enterprise. In

Securities and Exchange Commission v. *Continental Commodities Corp.*, 497 F.2d 516 (5th Cir. 1974) the Fifth Circuit dealt with this in a case which also involved commodity futures. The district court had held that the element of common enterprise was absent and that, therefore, no investment contract existed. "[T]he district court deemed the requisite commonality absent for two reasons: first, because each individual invested in different options, the accounts of individual investors were unrelated; and second, there was no understanding or expectation that investors would share in a common fund comprised of the returns on their investments. These reasons constituted the very impediments to a finding of commonality in Milnarik."* *Continental, supra*, p. 521. The Court of Appeals (in *Continental*) then goes on to comment on the holding of the Seventh Circuit in *Milnarik* which had declined to find a common enterprise in a discretionary commodity futures account. The Fifth Circuit, in *Continental*, stated that it could not "accept" the *Milnarik* view and reversed the determination of the district court. The Court, in *Continental*, seems to take the view that the element of common enterprise as such is less important than the other elements and that if the tests of "investment of money" and "led to expect profits solely from the efforts of others" are met, the common enterprise element somehow is blanketed in. The Court, in *Continental*, points out that "the success of the trading enterprise as a whole and customer investments individually, is contingent upon the sagacious investment counseling of Continental commodities. This conclusion comports with the resilient approach

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* *Milnarik* v. *M-S Commodities*, 457 F.2d 274 (7th Cir. 1972).

this court adopted to the 'solely from the effects of others' element in SEC v. Koscot Interplanetary, Inc. and the similar approach to the common enterprise element which that decision presaged.'"* *Continental, supra*, pages 522-523.

Our reading of *Howey* leaves us with the distinct impression that the Court there laid down a test comprising three elements. The Court in that relatively short opinion reiterated this test and these elements a number of times, the last of which was in the final paragraph of the opinion where the Court stated:

> The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.

In a previous paragraph the Court referred to a "profit-seeking business venture" in which the "investors provide the capital and share in the earnings and profits; the promoters manage, control and operate the enterprise." *Howey, supra*, page 300. When the Seventh [*sic*] Circuit in *Continental* uses the term "resilient approach" it apparently does so in reliance on the language in *Howey* where the Court, in reference to its definition of investment contract (one that relies on the three elements hereinabove set forth), says that it "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits" (*Howey, supra*, page 299). We view this as a characterization of

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* SEC v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir. 1974).

the definition set down by the Court and not as license to interpolate or relax the necessary ingredients.

Plaintiffs in the instant case made an investment in defendant broker's Guided Commodity Account Program, giving defendant authority to trade in commodities futures for plaintiffs' account(s). Plaintiffs at first realized profits from the trading that was done on their behalf by defendant. Subsequently losses were suffered by plaintiffs. Defendant's financial interest in the transactions was limited to commissions. We are unable to perceive how this sort of arrangement can be held to involve a common enterprise, regardless of how many other customers' accounts were being handled by defendant under similar arrangements.

We conclude that defendant's motion to dismiss Counts IV, V and VI of the Complaint for failure to state claims under the Securities Act of 1933 and the Securities Exchange Act of 1934 should be granted for the reason that no security was involved here since there was no "investment contract" as that term has been construed by the Supreme Court in the *Howey* case.

In light of the determination hereinabove made, we conclude that the third ground of defendant's motion is sound. If a security were involved herein the arbitration provision contained in the agreement between the parties would not be enforceable. Defendant, in its Reply Memorandum at page 12, concedes this. Since, however, we conclude that the parties hereto were not dealing in securities the arbitration agreement is not subject to the non-enforceability provision of the federal securities acts and is, therefore, valid.

An order may be presented in accordance with the foregoing.

By: /s/ Thomas P. Thornton
United States District Judge

Dated: 12-27-1976

ORDER

United States District Court
Eastern District of Michigan
Southern Division
(Filed, Feb. 23, 1977)
Civ. No. 6-70683

J. J. Curran, et al., Plaintiffs, vs. Merrill Lynch, Pierce, Fenner and Smith, a Delaware Corp., Defendant.

At a session of said Court held in the Federal Building, Detroit, on February 23, 1977. Present, Honorable Thomas P. Thornton, United States District Judge.

The motion of Defendant to Dismiss or, in the alternative, to dismiss in part and stay proceedings pending arbitration, having come on for hearing, the briefs of the parties with respect thereto having been filed and considered, the Court being fully advised in the premises, and the Court having rendered its Memorandum Opinion with respect thereto dated December 27, 1976,

IT IS HEREBY ORDERED that Counts IV, V and VI of Plaintiff's Complaint be and the same hereby are dismissed, and

IT IS FURTHER ORDERED that further proceedings in this Court are hereby stayed pending completion of proceedings in accordance with the arbitration agreement between the parties.

/s/ Thomas P. Thornton
United States District Judge

JUDGMENT

United States Court of Appeals
For the Sixth Circuit
(Filed May 12, 1980)
No. 77-1300

J. J. Curran, et al., Plaintiffs-Appellants, vs. Merrill Lynch, Pierce, Fenner and Smith, a Delaware Corp., Defendant-Appellee.

Before Livley and Engel, Circuit Judges and Phillips, Senior Circuit Judge.

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed in part, reversed in part, and remanded for further proceedings.

Each party to pay own costs on appeal.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
clerk

Issued as Mandate: June 9, 1980

Commodity Exchange Act

Section 2(a)(1), 7 U.S.C. §2

Definitions

For the purposes of this chapter "contract of sale" shall be held to include sales, agreements of sale, and agreements to sell. The word "person" shall be construed to import the plural or singular, and shall include individuals, associations, partnerships, corporations, and trusts. The word "commodity" shall mean wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil and all other fats and oils), cottonseed meal, cottenseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions as provided in section 13—1 of this title, and a.l services, rights, and interests in which contracts for future delivery are presently or in the future dealt in: *Provided*, That the Commission shall have exclusive jurisdiction with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title: *And provided further*, That, except as hereinabove provided, nothing contained in this section shall (i) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (ii) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State. Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade. The term "future delivery" as used in this chapter, shall not include any sale of any cash commodity for deferred shipment or delivery. The words "board of trade" shall be held to include and mean any exchange or association, whether incorporated or unincorporated, of persons who shall be engaged in the business of buying or selling commodity or receiving the same for sale on consignment. The words "interstate commerce" shall be construed to mean commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof, or within any Territory or possession, or the District of Columbia. The words "cooperative association of pro-

ducers" shall mean any cooperative association, corporate or otherwise, not less than 75 per centum in good faith owned or controlled, directly or indirectly, by producers of agricultural products and otherwise complying with sections 291 and 292 of this title, including any organization acting for a group of such associations and owned or controlled by such associations, provided that business done for or with the United States of America, or any agency thereof, shall not be considered either member or non-member business in determining the compliance of any such association with said section. The words "member of a contract market" shall mean and include individuals, associations, partnerships, corporations, and trusts owning or holding membership in, or admitted to membership representation on, a contract market or given members' trading privileges thereon. The words "futures commission merchant" shall mean and include individuals, associations, partnerships, corporations, and trusts engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom. The words "floor broker" shall mean any person who, in or surrounding any "pit", "ring", "post", or other place provided by a contract market for the meeting of persons similarly engaged, shall purchase or sell for any other person any commodity for future delivery on or subject to the rules of any contract market. The words "the Commission" shall mean the Commodity Futures Trading Commission established under section 4a of this title. The term "commodity trading advisor" shall mean any person who, for compensation or profit, engages in the business of advising others, either directly or through publications or writings, as to the value of commodities or as to the advisability of trading in any commodity for future delivery on or subject to the rules of any contract market, or who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning commodities; but does not include (i) any bank or trust company, (ii) any newspaper reporter, newspaper columnist, newspaper editor, lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation including their employees, (v) any contract market, and (vi) such other persons not within the intent of this definition as the Commission may specify by rule, regulation, or order: *Provided*, That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession. The term "commodity pool operator" shall mean any person engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract mar-

ket, but does not include such persons not within the intent of this definition as the Commission may specify by rule or regulation or by order.

Sept. 21, 1922, c. 369, § 2(a)(1), formerly § 2(a), 42 Stat. 998; June 15, 1936, c. 545, §§ 2, 3, 49 Stat. 1491; Apr. 7, 1938, c. 108, 52 Stat. 205; Oct. 9, 1940, c. 786, § 1, 54 Stat. 1059; Aug. 28, 1954, c. 1041, Title VII, § 710(a), 68 Stat. 913; July 26, 1955, c. 382, § 1, 69 Stat. 375; Feb. 19, 1968, Pub.L. 90-258, § 1, 82 Stat. 26; July 23, 1968, Pub.L. 90-418, 82 Stat. 413; renumbered and amended Oct. 23, 1974, Pub.L. 93-463, Title I, § 101(a)(1), (2), Title II, §§ 201, 202, 88 Stat. 1389, 1395; Sept. 30, 1978, Pub.L. 95-405, § 2(1), 92 Stat. 865.

Section 4b, 7 U.S.C. §6b

Contracts designed to defraud or mislead; bucketing orders; buying and selling orders for commodities

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

Nothing in this section or in any other section of this chapter shall be construed to prevent a futures commission merchant or floor broker who shall have in hand, simultaneously, buying and selling orders at the market for different principals for a like quantity of a commodity for future delivery in the same month, from executing such buying and selling orders at the market price: *Provided,* That any such execution shall take place

on the floor of the exchange where such orders are to be executed at public outcry across the ring and shall be duly reported, recorded, and cleared in the same manner as other orders executed on such exchange: *And provided further*, That such transactions shall be made in accordance with such rules and regulations as the Commission may promulgate regarding the manner of the execution of such transactions.

As amended Feb. 19, 1968, Pub.L. 90–258, § 5, 82 Stat. 27; Oct. 23, 1974, Pub.L. 93–463, Title IV, § 405, 88 Stat. 1413.

Section 14, 7 U.S.C. §18

Complaints against registered persons—Petition

(a) Any person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to be registered under section 6d, 6e, 6j, or 6m of this title may, at any time within two years after the cause of action accrues, apply to the Commission by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Commission, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commission to the respondent, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Commission.

Investigation and hearing

(b) If there appear to be, in the opinion of the Commission, any reasonable grounds for investigating any complaint made under this section, the Commission shall investigate such complaint and may, if in its opinion the facts warrant such action, have said complaint served by registered mail or by certified mail or otherwise on the respondent and afford such person an opportunity for a hearing thereon before an Administrative Law Judge designated by the Commission in any place in which the said person is engaged in business: *Provided*, That in complaints wherein the amount claimed as damages does not exceed the sum of $5,000 a hearing need not be held and proof in support of the complaint and in support of the respondent's answer may be supplied in the form of depositions or verified statements of fact.

Determination

(c) After opportunity for hearing on complaints where the damages claimed exceed the sum of $5,000 has been provided or waived and on complaints where damages claimed do not exceed the sum of $5,000 not requiring hearing as provided herein, the Commission shall determine whether or not the respondent has violated any provision of this chapter or any rule, regulation, or order thereunder.

Bond requirement when complainant is nonresident; waiver

(d) In case a complaint is made by a nonresident of the United States, the complainant shall be required, before any formal action is taken on his complaint, to furnish a bond in double the amount of the claim conditioned upon the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail, and any reparation

award that may be issued by the Commission against the complainant on any counterclaim by respondent: *Provided*, That the Commission shall have authority to waive the furnishing of a bond by a complainant who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.

Reparations

(e) If after a hearing on a complaint made by any person under subsection (a) of this section, or without hearing as provided in subsections (b) and (c) of this section, or upon failure of the party complained against to answer a complaint duly served within the time prescribed, or to appear at a hearing after being duly notified, the Commission determines that the respondent has violated any provision of this chapter, or any rule, regulation, or order thereunder, the Commission shall, unless the offender has already made reparation to the person complaining, determine the amount of damage, if any, to which such person is entitled as a result of such violation and shall make an order directing the offender to pay to such person complaining such amount on or before the date fixed in the order. If, after the respondent has filed his answer to the complaint, it appears therein that the respondent has admitted liability for a portion of the amount claimed in the complaint as damages, the Commission under such rules and regulations as it shall prescribe, unless the respondent has already made reparation to the person complaining, may issue an order directing the respondent to pay to the complainant the undisputed amount on or before the date fixed in the order, leaving the respondent's liability for the disputed amount for subsequent determination. The remaining disputed amount shall be determined in the same manner and under the same procedure as it would have been determined if no order had been issued by the Commission with respect to the undisputed sum.

Enforcement of reparation award

(f) If any person against whom an award has been made does not pay the reparation award within the time specified in the Commission's order, the complainant, or any person for whose benefit such order was made, within three years of the date of the order, may file a certified copy of the order of the Commission, in the district court of the United States for the district in which he resides or in which is located the principal place of business of the respondent, for enforcement of such reparation award by appropriate orders. The orders, writs, and processes of such district court may in such case run, be served, and be returnable anywhere in the United States. The petitioner shall not be liable for costs in the district court, nor for costs at any subsequent state of the proceedings, unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. Subject to the right of appeal under subsection (g) of this section, an order of the Commission awarding reparations shall be final and conclusive.

Review

(g) Any order of the Commission entered hereunder shall be reviewable on petition of any party aggrieved thereby, by the United States Court of Appeals for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located, under the procedure provided in section 9 of this title. Such appeal shall not be effective unless within 30 days from and after the date of the reparation order the appellant also files with the clerk of the court a bond in double the amount of the reparation awarded against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail. Such bond shall be in the form of cash, negotiable securities having a market value at least equivalent to the amount of bond prescribed, or the undertaking of a surety company on the approved list of sureties issued by the Treasury Department of the United States. The appellee shall not be liable for costs in said court. If the appellee prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs.

Penalty

(h) Unless the registrant against whom a reparation order has been issued shows to the satisfaction of the Commission within fifteen days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order, he shall be prohibited from trading on all contract markets and his registration shall be suspended automatically at the expiration of such fifteen-day period until he shows to the satisfaction of the Commission that he has paid the amount therein specified with interest thereon to date of payment: *Provided*, That if on appeal the appellee prevails or if the appeal is dismissed the automatic prohibition against trading and suspension of registration shall become effective at the expiration of thirty days from the date of judgment on the appeal, but if the judgment is stayed by a court of competent jurisdiction the suspension shall become effective ten days after the expiration of such stay, unless prior thereto the judgment of the court has been satisfied.

Effective date

(i) The provisions of this section shall not become effective until fifteen months after October 23, 1974: *Provided*, That claims which arise within one year immediately prior to the effective date of this section may be heard by the Commission after such fifteen months period. Sept. 21, 1922, c. 369, § 14, as added Oct. 23, 1974, Pub.L. 93-463, Title I, § 106, 88 Stat. 1393, and amended Apr. 16, 1975, Pub.L. 94-16, § 3, 89 Stat. 77; Sept. 30, 1978, Pub.L. 95-405, § 21, 92 Stat. 875.

COMMODITY FUTURES TRADING COMMISSION
REG. § 180.3, 17 C.F.R. § 180.3

Voluntary procedure and compulsory payments.

(a) The use by customers of the dispute settlement procedures established by contract markets pursuant to the Act or this Part or of the arbitration or other dispute settlement procedures specified in an agreement under paragraph (b)(3) of this section shall be voluntary. The procedures so established shall prohibit any agreement or understanding pursuant to which customers of members of the contract market agree to submit claims or grievances for settlement under said procedures prior to the time when the claim or grievance arose, except in accordance with paragraph (b) of this section.

(b) No futures commission merchant, floor broker or associated person shall enter into any agreement or understanding with a customer in which the customer agrees, prior to the time the claim or grievance arises, to submit such claim or grievance to any settlement procedure except as follows:

(1) Signing the agreement must not be made a condition for the customer to utilize the services offered by the futures commission merchant, floor broker or associated person;

(2) If the agreement is contained as a clause or clauses of a broader agreement, the customer must separately endorse the clause or clauses containing the cautionary language and other provisions specified in this section;

(3) The agreement may not require the customer to waive the right to seek reparations under section 14 of the Act and Part 12 of these regulations. Accordingly, the customer must be advised in writing that he or she

may seek reparations under section 14 of the Act by an election made within 45 days after the futures commission merchant, floor broker or associated person notifies the customer that arbitration will be demanded under the agreement. This notice must be given at the time when the futures commission merchant, floor broker or associated person notifies the customer of an intention to arbitrate. The customer must also be advised that if he or she seeks reparations under section 14 of the Act and the Commission declines to institute reparation proceedings, the claim or grievance will be subject to the preexisting arbitration agreement and must also be advised that aspects of the claims or grievances that are not subject to the reparations procedure (i.e. do not constitute a violation of the Act or rules thereunder) may be required to be submitted to the arbitration or other dispute settlement procedure set forth in the preexisting arbitration agreement.

(4) The customer agreement must contain cautionary language, printed in large boldface type, to the following effect:

WHILE THE COMMODITY FUTURES TRADING COMMISSION (CFTC) RECOGNIZES THE BENEFITS OF SETTLING DISPUTES BY ARBITRATION, IT REQUIRES THAT YOUR CONSENT TO SUCH AN AGREEMENT BE VOLUNTARY. YOU NEED NOT SIGN THIS AGREEMENT TO OPEN AN ACCOUNT WITH [name]. See 17 CFR 180.1-180.6.

BY SIGNING THIS AGREEMENT, YOU MAY BE WAIVING YOUR RIGHT TO SUE IN A COURT OF LAW, BUT YOU ARE NOT WAIVING YOUR RIGHT TO ELECT AT A LATER DATE TO PROCEED PURSUANT TO SECTION 14 OF THE COMMODITY EXCHANGE ACT TO SEEK DAMAGES SUSTAINED

AS A RESULT OF A VIOLATION OF THE ACT. IN THE EVENT A DISPUTE ARISES, YOU WILL BE NOTIFIED IF [name] INTENDS TO SUBMIT THE DISPUTE TO ARBITRATION. IF YOU BELIEVE A VIOLATION OF THE COMMODITY EXHANGE ACT IS INVOLVED AND IF YOU PREFER TO REQUEST A SECTION 14 "REPARATIONS" PROCEEDING BEFORE THE CFTC, YOU WILL STILL HAVE 45 DAYS IN WHICH TO MAKE THAT ELECTION.

(5) If the agreement specifies a forum for settlement other than a procedure established pursuant to section 5a(11) of the Act or this Part, the procedures of such forum must comply with the requirements of § 180.5.

(c) The procedure established by a contract market pursuant to section 5a(11) of the Act or this Part may require parties utilizing such procedure to agree, under applicable state law, submission agreement or otherwise, to be bound by an award rendered in the procedure, provided that the agreement to submit the claim or grievance to the procedure was made in accordance with paragraph (b) of this section or that the agreement to submit the claim or grievance was made after the claim or grievance arose. Any award so rendered shall be enforceable in accordance with applicable law.

(d) The procedure established by a contract market pursuant to the Act or this Part shall not establish any unreasonably short limitation period foreclosing submission of customers' claim [*sic*] or grievances or counterclaims (permitted by § 180.4 or [*sic*] this Part) by contract market members or employees thereof.

(7 U.S.C. 7a(11), 12a (Supp. V, 1975))

[41 FR 42946, Sept. 29, 1976, as amended at 42 FR 3433, Jan. 18, 1977]

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No. 80-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.
Petitioner,

v.

J. J. CURRAN and JACQUELYN L. CURRAN
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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OCTOBER TERM, 1980
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MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.
Petitioner,

v.

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Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The petition for a writ of certiorari previously filed by Petitioner presents the question of whether the Commodity Exchange Act ("CEA") creates an implied private right of action for fraud in favor of a customer against his broker. The Court below, by a divided panel, held that such a right of action does exist. *Curran* v *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 622 F.2d 216 (6th Cir. 1980). The United States Court of Appeals for the Second Circuit, also by a divided panel, similarly has held that there exists an implied private right of action under various sections of the CEA. *Leist* v *Simplot*, 2 CCH Comm.Fut.L.Rep. ¶ 21,051 (1980). The *Leist* decision is the subject of consolidated petitions for writs of certiorari pending before the Court in Docket Nos. 80-757, 895, 936.

This supplemental brief is submitted to bring to the attention of the Court the decision of the United States Court of Appeals for the Fifth Circuit, announced on December 16, 1980, in *Rivers* v *Rosenthal & Co.* (No. 79-1313) wherein the Court unanimously held that there is no private right of action in favor of a customer against his broker under the anti-fraud provisions of the CEA. A copy of the Court of Appeals opinion in *Rivers* is appended hereto.

The question decided in *Rivers* is identical to that decided by the Court below. The cases are irreconcilable.

There now exists a direct conflict between the Courts of Appeals on this important question of federal law. For this additional reason, as well as for those raised in the petition, the writ should issue.

Respectfully submitted,

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Dated: January 9, 1981.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-1313

JOHN RIVERS and TOM LAMB (Dan P. Rivers, as Executor of the will of John Rivers, substituted in place and stead of John Rivers, deceased),

Plaintiffs-Appellees,

—versus—

ROSENTHAL & COMPANY,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

(December 16, 1980)

Before:

KRAVITCH, HENDERSON and REAVLEY,

Circuit Judges.

REAVLEY, *Circuit Judge:*

This appeal presents a single legal question: whether there exists an implied private right of action under the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 1-24, as revised in 1974, to redress commodity futures customers for damages sustained from their brokers' violations of the antifraud provisions and broker registration requirements

of that Act, 7 U.S.C. §§ 6b,[1] 6k,[2] and the corresponding reg-

[1] 7 U.S.C. § 6b provides, in pertinent part:

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person;

* * *

[2] 7 U.S.C. § 6k provides, in pertinent part:

(1) It shall be unlawful for any person to be associated with any futures commission merchant or with any agent of a futures commission merchant as a partner, officer, or employee (or any person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation or acceptance of customers' orders (other than in a clerical capacity) or (ii) the supervision of any person or persons so engaged, unless such person shall have registered, under this chapter, with the Commission and such registration shall not have expired nor been suspended (and the period of suspension has not expired) or revoked, and it shall be unlawful for any futures commission merchant or any agent

ulations, 17 C.F.R. §§ 32.3, 32.9 (1979).[3] Relying upon such an implied right of action, as well as fraud and fiduciary violation grounds with which we are not here concerned, John Rivers and Tom Lamb brought suit below against Rosenthal & Company and an agent[4] in its Memphis, Tennessee office, Carl M. Tipton. Rivers and Lamb allege that in 1976 and 1977 they suffered substantial losses in commodity futures transactions conceived and carried out in their behalf by Tipton in violation of the antifraud and registration provisions noted above.

Arguing that no such private right of action exists, Rosenthal moved to dismiss under Fed. R. Civ. P. 12(b)(6), those counts of the complaint based on the alleged violations of the CEA. The district court determined that an implied right of action was available to Rivers and Lamb and denied the motion to dismiss. Upon the appropriate recommendation of the district court that the denial of this motion entailed a controlling and controversial question of law the immediate resolution of which would materially advance the ultimate termination of litigation, this court accepted the interlocutory appeal pursuant to 28 U.S.C. § 1292(b). We now reverse, holding that no implied private

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of a futures commission merchant to permit such a person to become or remain associated with him in any such capacity if such futures commission merchant or agent knew or should have known that such person was not so registered or that such registration had expired, been suspended (and the period of suspension has not expired) or revoked: *Provided*, That any individual who is registered as a floor broker or futures commission merchant (and such registration is not suspended or revoked) need not also register under these provisions.

• • •

[3] *See also* 7 U.S.C. §§ 6b, 12a(5) (providing authority for promulgation of regulations and proscribing their contravention).

[4] 7 U.S.C. § 4 imposes upon principals such as Rosenthal the responsibility for the acts and omissions of their agents.

right of action is available to plaintiffs-appellees, Rivers and Lamb.[5]

I. Background

The question we face here has already received considerable judicial attention since the 1974 amendments to the CEA. Within the past half year the Second and Sixth Circuits have ruled that an implied private right of action does exist under the CEA, but both decisions were rendered by split panels over very forceful dissents. *Leist* v. *Simplot*, —— F.2d —— (2d Cir. [slip op. nos. 79-7402, -7464, -7482, July 8,] 1980) (per Friendly, J., finding right of action for contraventions of various sections, such as 7 U.S.C. §§ 6b, 7(d), 7a(8), 13(b), proscribing market manipulation, fraud, and dilatory behavior by exchanges; Mansfield, J. dissenting); *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith*, 622 F.2d 216 (6th Cir. 1980), *petition for cert. filed*, 48 U.S.L.W. 3053 (U.S. Aug. 9, 1980) (No. 80-203) (private action for violation of antifraud provisions such as § 6(b).[6] Since 1974 numerous district courts also

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[5] The named parties are joined on this appeal by the Commodity Futures Trading Commission ("CFTC") and Drexel Burnham, Lambert, Inc., as *amici curiae*. The CFTC appears in favor of the implied right, Drexel in opposition. The court is indebted to them for their scholarly contributions.

[6] As of this writing, these are the only other two circuits to have engaged in a reasoned analysis of the existence of an implied private right of action under the CEA as constituted following the 1974 revision. *But see Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Goldman*, 593 F.2d 129, 133 n.7 (8th Cir.), *cert. denied*, —— U.S. ——, 100 S.Ct. 79 (1979) (noting summarily in dictum that "[s]uch actions are well recognized."); *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96, 103 & n.8 (7th Cir. 1977) (similar perfunctory assertion). This court has not faced the issue heretofore, although twice since 1974 it has expressly reserved decision on the existence of a cause of action under the Act as constituted *prior* to the 1974 amendments. *Chipser* v. *Kohlmeyer & Co.*, 600 F.2d 1061, 1067 & n.14 (5th Cir. 1979); *Moody* v. *Bache & Co., Inc.*, 570 F.2d 523, 528-29 (5th Cir. 1978).

have faced the issue, with a slight majority of these courts finding that a cause of action is available under various provisions.[7]

In light of the extensive examination and exposition of the question already appearing in or destined for the federal judicial reports—particularly the exhaustive and scholarly opinions of Judges Friendly and Mansfield for the Second Circuit in *Leist* v. *Simplot*—we would serve no purpose by again retracing in minute detail either the historical or legislative background of the 1974 amendment to the CEA. We do make a brief foray into the background of the Act and its judicial treatment to set the stage for discussion of the contest.

A. *Prior to 1974*

The present federal statutory scheme for regulating the trading of commodity futures traces its lineage back to The Futures Trading Act, ch. 86, 42 Stat. 187 (1921), and its successor, The Grain Futures Act, ch. 369, 42 Stat. 998

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[7] *Compare, e.g., Grayson* v. *ContiCommodity Serv. Inc.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,033 (D.D.C. May 23, 1980) (action pursuant to 7 U.S.C. § 6b); *Navigator Group Funds* v. *Shearson Hayden Stone, Inc.*, 487 F. Supp. 416 (S.D.N.Y. 1980) (§ 6b); *Alken* v. *Lerner*, 485 F.Supp. 871 (D.N.J. 1980) (§ 6b); *Smith* v. *Groover*, 468 F.Supp. 105 (N.D. Ill. 1979) (§§ 6b, 13a, 13b); *Poplar Grove Planting & Refining Co.* v. *Bache Halsey Stuart, Inc.*, 465 F.Supp. 585, 589-90 (M.D. La. 1979) (§§ 6b, 6d), all finding implied private rights of action, *with, e.g., Stone* v. *Saxon Windsor Group Ltd.*, 485 F.Supp. 1212 (N.D. Ill. 1980) (construing §§ 6c(b), (c)); *Sunnyside Eggs, Inc.* v. *Urner Barry Publ., Inc.*, No. 78-1661A (N.D. Ga. Mar. 28, 1980) (§ 13b); *Fischer* v. *Rosenthal & Co.*, 481 F. Supp. 53 (N.D. Tex. 1979) (§ 6b); *Bartels* v. *International Commodities Corp.*, 435 F.Supp. 865 (D. Conn. 1977) (§ 6b), all ruling that no private cause of action exists under the CEA as amended in 1974. *See also Hofmayer* v. *Dean Witter & Co., Inc.*, 459 F.Supp. 733 (N.D. Cal. 1978) (finding right of action under fraud provisions, §§ 6b and 6o, but not for violation of registration provisions, §§ 6k and 6n (as alleged here), or for violation of exchange rules).

(1922). These acts, limited to grain futures, inaugurated the pattern of restricting futures trading to designated "contract markets," *i.e.* central exchanges subject to government supervision and charged with adopting measures to prevent price manipulation.[8] Although these acts empowered the government to take some steps against individual price manipulations, in practice almost total reliance for the regulation of such activities rested with the individual exchanges.

In 1936, Congress significantly expanded the scope of federal regulation of the futures trading industry and retitled the legislation the "Commodity Exchange Act," ch. 545, 49 Stat. 1491 (1936). Under this Act, regulatory coverage went beyond grain futures to include other specified agricultural commodities. Additional substantive regulatory provisions were enacted, including an antifraud provision, § 4b, 49 Stat. 1493, in essentially the same form as that in the present codification, 7 U.S.C. § 6b, which forms one of the bases of this action. Greater direct government control of market abuses by individual traders also was established by the addition of criminal sanctions for violation of the proscription against price manipulation as well as fines and penalties for the transgressions of other provisions and by the vesting of broader powers of direct

[8] The mechanism through which the 1921 Act was to accomplish its systemization of the national futures trade—*i.e.* by the levying of a tax on all grain futures contracts traded other than on licensed contract markets—soon was declared an unconstitutional exercise of the taxing power. *Hill* v. *Wallace*, 259 U.S. 44 (1922). Almost immediately, however, Congress redrafted the substantive provisions, substituted for the offending tax section a simple proscription of all futures dealings other than on licensed contract markets, and reenacted the whole pursuant to its power to regulate interstate commerce as The Grain Futures Act. The Supreme Court upheld the new Act as constitutional in *Board of Trade* v. *Olsen*, 262 U.S. 1 (1923).

supervision and enforcement in the Department of Agriculture.

Notwithstanding this beefing up of the federal regulatory scheme, the principal emphasis and essential philosophy of the legislatien remained one of industry self-regulation through the contract markets. *Curran* v. *Merrill Lynch*, 622 F.2d at 231; *Stone* v. *Saxon & Windsor Group Ltd.*, 485 F.Supp. at 1214. Despite similar, though less expansive, amendments in 1968 that increased the sanctions and penalties under the CEA and added several new substantive requirements not pertinent here, Pub. L. 90-258, 82 Stat. 26 (1968), the basic approach of industry self-regulation continued until the drastic revision of the CEA in 1974.

Significantly for our purposes, the relatively limited role expressly legislated for the federal government to play in the active enforcement of this expanding regulatory scheme during the period 1922-1974 consisted of punitive or coercive mechanisms such as fines, removal of licenses, or criminal penalties—all sanctions against transgressors. Congress did not expressly provide for any federal judicial or administrative forum or remedy through which those injured due to fraud or other violations of the acts or regulations could seek redress from those transgressors.

By at least 1967 with the decision in *Goodman* v. *H. Hentz & Co.*, 265 F.Supp. 440, 447 (N.D. Ill. 1967), however, the courts began to fill that void by finding an implied private right of action under the CEA. *See Leist* v. *Simplot*, —— F.2d at ——, [slip op. at 4076] (intimating that private actions may have been maintained prior to and in greater number than is indicated by only the published decisions). In fact, all courts that decided the issue held unanimously that such a private cause of action was available under the CEA as constituted ***prior to***

1974. See, e.g., Deaktor v. *L. D. Schreiber & Co.*, 479 F.2d 529, 534 (7th Cir. 1973), *rev'd on other grounds sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973) (cause of action under 7 U.S.C. § 13b); *Booth* v. *Peavey Co. Community Services*, 430 F.2d 132, 133 (8th Cir. 1970) (§ 6(d)); *Arnold* v. *Bache & Co., Inc.*, 377 F.Supp. 61, 65 (M.D. Pa. 1973) (§ 6b); *McCurnin* v. *Kohlmeyer & Co.*, 340 F.Supp. 1338, 1343 (E.D. La. 1972), *aff'd per curiam*, 477 F.2d 113 (5th Cir. 1973). *But see Chipser* v. *Kohlmeyer & Co.*, 600 F.2d 1061, 1067 & n.14 (5th Cir. 1979) (suggesting existence of pre-1974 cause of action an open question upon remand); *Moody* v. *Bache & Co.*, 570 F.2d 523, 528-29 (5th Cir. 1978). Moreover—although the correctness of these decisions is dubious when measured against the present wisdom for determining the existence of implied rights of action, *see, e.g., Transamerica Mortgage Advisors, Inc.* v. *Lewis*, —— U.S. ——, 100 S.Ct. 242 (1979) ("TAMA") and Part II, *infra*—this course of allowing the victims of violations to take the initiative and hail their trespassing tormentors before the courts was basically consistent with that era's fundamental approach of relying principally upon the self-policing of the futures trades by those involved in it.

B. *1974 Amendments*

By the early 1970's, however, the vastly increased volume, scope and complexity of futures trading and the apparent inability of the individual exchanges to cope coherently and satisfactorily with these geometrically expanding problems compelled a reevaluation of that basic self-regulatory approach. S. Rep. No. 850, 95th Cong., 2d Sess. 8-10, *reprinted* in [1978] U.S. Code Cong. & Ad. News 2087, 2096-98; S. Rep. No. 1131, 93d Cong., 2d Sess., *reprinted* in [1974] U.S. Code Cong. & Ad. News 5843, 5858-59. The product of this reevaluation was the Commodity

Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389 ("CFTCA"). Different in *character* from even the significant amendments of 1936 and 1968, the CFTCA "signalled a dramatic shift from the theory of exchange self-regulation," upon which federal futures trading legislation had been premised up to that point, *Leist* v. *Simplot*, —— F.2d at ——, [slip op. at 4075], and proposed in its place "a comprehensive regulatory structure" creating a coherent uniform system of federal control over the entirety of the national futures trading industry. H.R. Rep. No. 975, 93d Cong., 2d Sess. 1. Consequently, rather than comprising mere patchwork additions as had all prior amendatory schemes, the CFTCA actually constituted "the first *complete overhaul* of the Commodity Exchange Act since its inception." *Id.* (emphasis added).

The CFTCA dramatically expanded federal regulatory coverage beyond agricultural products to encompass futures trading in several categories of goods and services not previously regulated. *See* 7 U.S.C. §§ 2, 6c(a) & (b). The most significant changes pertinent to our consideration here, however, came in the total revamping of the regulatory oversight and enforcement systems designed to effectuate the shift in policy to a uniform, comprehensive federal control over the industry.

The focal point of this shift was the creation of the Commodity Futures Trading Commission ("CFTC"), a strong regulatory body, vested with exclusive jurisdiction over futures trading, 7 U.S.C. § 2, that was to be the keystone of the new comprehensive federal regulatory structure. Federal oversight responsibility over the daily functioning of the industry was greatly expanded through the CFTC. For example, the Commission was empowered to designate and to prescribe certain terms of operation for

licensed contract markets, as well as to review all regulations and bylaws of these markets and to disapprove, alter or supplement those rules insofar as it deemed necessary. *See, e.g.*, 7 U.S.C. § 12a(7). Further, the activities of certain classes of individual traders were for the first time brought under the federal eye by the requirement that they register periodically with the CFTC. *See, e.g.*, 7 U.S.C. § 6k (one of the provisions forming the basis of plaintiffs' complaint here, requiring registration of associates of futures commission merchants).

Central to our concern are those provisions elaborately overhauling the comparatively limited enforcement scheme extant under the old law in order to assure compliance with the new oversight provisions above, and the many substantive standards of conduct that had been carried forward into the new statutory framework virtually unchanged (such as the antifraud provision, § 6b, involved here). Consistent with the shift in philosophy toward affirmative federal responsibility, this renovated enforcement system was greatly strengthened relative to prior law both by the enhancement of some old tools and by the addition of several potent new ones. *See* S. Rep. No. 850, *supra* at 11-12. For example, maximum civil penalties and fines assessable against individual violators and against contract markets that failed to enforce their rules were drastically increased from $10,000 to $100,000 per episode. *See, e.g.*, 7 U.S.C. §§ 13a, 13b. The Commission also was newly empowered, for instance, to sue in federal court for injunctive relief whenever it appeared that an individual or contract market had engaged, was engaging, or was about to engage in conduct violating the Act or regulations, 7 U.S.C. § 13a-1, as well as to conduct disciplinary proceedings against exchange members, 7 U.S.C. § 12c, and revoke or suspend the registration or trading priv-

ileges of any such individual, 7 U.S.C. §§ 6n(6), 9, or contract market, 7 U.S.C. § 7b.

Most importantly, the 1974 Act for the first time expressly provided the means for persons injured by violations of the Act to seek redress from those responsible. First, each designated contract market was required to provide an arbitration or other informal procedure for the settlement of customers' claims and grievances involving less than $15,000.[9] 7 U.S.C. § 7a(11). Second, the Act established an administrative reparations procedure pursuant to which complaints might be filed with the CFTC against virtually any futures trading professional required to be registered under the Act. 7 U.S.C. § 18. The CFTC is obliged to investigate such complaints and, if warranted in the Commission's opinion, to allow the complainant to proceed against the alleged culprit before an administrative law judge either by hearing or by depositions or certified statements of facts, depending upon the size of the claim. 7 U.S.C. § 18(b). The administrative law judge in turn is authorized to rule upon the merits of the claim and to order payment of damages necessary to compensate the injured individual. *See, e.g., Gordon* v. *Shearson Hayden Stone, Inc.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,016 (April 10, 1980). An order of payment is enforceable in federal district court, and the Commission's ruling on the merits of a claim may be appealed by either party to the court of appeals in the designated circuit. 7 U.S.C. § 18(f), (g).[10]

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[9] As indicated by this provision, the role of the individual exchanges, particularly in the enforcement vein, was not totally extinguished despite the shift in policy toward a more uniform, government-controlled regulatory system. *See also* 7 U.S.C. § 21 (enabling provision for the creation of registered futures associations formed to engage in broad industry self-regulation).

[10] The CEA was significantly amended again in 1978. Futures Trading Act of 1978, Pub. L. 95-405, 92 Stat. 865. These altera-

The question we face is whether an implied judicial private right of action also was meant to be included among the panoply of express enforcement tools in this "comprehensive regulatory structure" erected by the 1974 revision. We conclude that it was not.

II. Defining the Inquiry

As indicated by our recent opinions in *United States* v. *Capeletti Bros., Inc.*, 621 F.2d 1309, 1313 (5th Cir. 1980) and *Rogers* v. *Frito-Lay, Inc.*, 611 F.2d 1074, 1078 (5th Cir.), *petition for cert. filed*, 48 U.S.L.W. 3769 (no. 79-1810, May 14, 1980), this court continues to employ the factors articulated in *Cort* v. *Ash*, 422 U.S. 66 (1975), as a guide to determining whether a cause of action should be inferred from any particular statutory scheme. In *Cort* the Supreme Court identified four factors it considered particularly relevant to this inquiry:

> "First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one . . . ? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff . . . ? And

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tions took the form primarily of adjustments to the framework erected in 1974. The most significant changes for our purposes were the modification of the reparations procedure to allow full-fledged hearings only for claims greater than $5,000 (as opposed to $2,500 in the original enactment), 7 U.S.C. § 18(b)&(c), and the addition of a new provision expressly allowing the attorneys general of the various states to lodge damage actions in federal courts on behalf of their residents against alleged violators of the Act, 7 U.S.C. § 13a-2. These amendments and their legislative history will be discussed more fully as they appear pertinent to the analysis below.

finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

422 U.S. at 78 (citations omitted, emphasis in original).

In its more recent pronouncements in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, —— U.S. ——, 100 S.Ct. 245, 249 (1979) (*"TAMA"*) and *Touche Ross & Co.* v. *Redington*, —— U.S. ——, ——, ——, 99 S.Ct. 2479, 2485, 2489 (1979), however, the Supreme Court has made clear that the dispositive inquiry in evaluating claims upon implied rights of action is the divining of whether *Congress intended* such a cause of action to be born,[11] the second of the

[11] This conclusive reliance upon congressional intent in the evaluation of claims of implied rights of action is not simply an expedient tool or canon of construction, but is rooted in the limitations of the functional role allotted the judiciary by the Constitution. *United States* v. *Capeletti Bros.*, 621 F.2d at 1312; *Rogers* v. *Frito-Lay*, 611 F.2d at 1078. *See also Cannon* v. *University of Chicago*, —— U.S. ——, ——, 99 S.Ct. 1946, 1981-85 (1979) (Powell, J., dissenting). Although we may breathe practical life into them, the federal judiciary—endowed with no legislative or policy making authority—has no power to "imply" or otherwise to create private causes of action supplementary to express statutory schemes. Rather, we may only recognize or infer rights of action affirmatively created by the Legislative Branch, whether that affirmative legislative intent is manifested expressly in statutory language or by implication in statutory stretture, context, or legislative history. That this approach may justifiably be characterized as a retrenchment from that applied in the recent past, when causes of action might have been judicially "implied" merely upon a court's policy determination that such a cause would be useful or "necessary" to statutory goals, is a lamentable indictment of our past failure to recognize or confine ourselves to our constitutionally assigned role and our concomitant willingness to countenance Congress' abdication to the courts of its constitutionally assigned policy making responsibility. *See Cannon* v. *University of Chicago*, —— U.S. at ——, 99 S.Ct. at 1981-85 (Powell, J., dissenting). *See also, TAMA*, —— U.S. at ——, 100 S.Ct. at 249 (Powell, J., concurring and indicating that the approach deployed there was consistent with his *Cannon* dissent).

Cort criteria. Thus the *Cort* factors, rather than being utilized as some sort of self-contained litmus test, are useful only insofar as they help to elucidate that legislative intent.[12] Indeed, as the opinions in both *TAMA* and *Touche Ross* demonstrate, should the issue of intent be settled by, for example, the legislative history and the language or structure of the statute, the inquiry has reached its end and no purpose is served by the further ritualistic application of the remainder of the *Cort* litany.[13] *TAMA*, —— U.S. at

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[12] Since the primary indicators of legislative intent are the language and overall structure of a statute as well as its legislative history and the context of its enactment, the first and third of the *Cort* factors are useful guideposts to intent, although not as directly to the point as the inquiry directed by the second criterion. *Touche Ross*, —— U.S. at ——, 99 S.Ct. at 2489; *Rogers* v. *Frito-Lay*, 611 F.2d at 1078-79 n.4.

[13] Our path is smoothed somewhat in that respect here by appellant Rosenthal's decision not to dispute two of the four *Cort* criteria. Appellant first has conceded, as it must, that regulation of the commodity futures trade plainly is not an area traditionally relegated to state law. Therefore, this fourth factor, to the extent that it carries any weight, balances in favor of the plaintiffs and will not be discussed further. Appellant further conceded in its Reply Brief that the first *Cort* factor—that plaintiffs are members "of a class for whose *especial* benefit to the statute was enacted"—should similarly be resolved in plaintiffs' favor. We are less certain of the correctness or advisability of this concession, particularly in light of this court's rigorous analysis of this factor in *United States* v. *Capeletti Bros.*, 621 F.2d at 1313-14. Also, *compare TAMA*, —— U.S. at ——, 100 S.Ct. at 249 (observing that § 206 of the Investment Advisors Act, 15 U.S.C. § 806-6 (an antifraud statute strikingly similar to that in issue here), "concededly was intended to protect the victims of the fraudulent practices it prohibited") *with Cannon* v. *University of Chicago*, —— U.S. ——, —— n.13, 99 S.Ct. 1946, 1955 n.13 (1979) (intimating in dictum that rule 10b-5 under the Securities Exchange Act of 1934 merely "create[s] duties on the part of persons for the benefit of the public at large" rather than a right in specific persons). *See also Leist* v. *Simplot*, —— F.2d at ——, —— [slip op. at 4063-71, dissent at 4133-42] (majority and dissent differ with regard to "especial benefit" factor when CEA applied to futures "speculators"). In fact, concession of this factor might have seriously skewed our analysis of the case under the puzzling

——, 100 S.Ct. at 249; *Touche Ross*, —— U.S. at ——, 99 S.Ct. at 2489.

As indicated above and as unquestioningly recognized by every court to entertain the issue, the focus of our inquiry is properly directed to the 1974 revision of the CEA. While many of the individual concepts and provisions originated in prior enactments, including § 6b (the antifraud provision), the overall "regulatory scheme as it exists today is a product of the 1974 amendments" and the drastic shift in regulatory philosophy that they represent. *Navigator Group Funds* v. *Shearson Hayden Stone, Inc.*, 487 F.Supp. 416, 420 & n.6 (S.D.N.Y. 1980). Thus it is the intent of that Congress and the legislative history of that enactment that will form the basis of our decision here.

This focus on what is basically revisionary legislation, as opposed to an altogether new and original enactment, requires some adjustment or at least some reevaluation of

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assertion by the Supreme Court in *Cannon* that where "it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a cause of action, although an explicit purpose to deny such a cause of action would be controlling." —— U.S. at ——, 99 S.Ct. at 1956, *quoting Cort* v. *Ash*, 422 U.S. at 82 (dictum) (emphasis in original).

The Supreme Court has more recently observed in *TAMA*, however, that "the mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf. [citations omitted]. The dispositive question remains whether Congress intended to create any such remedy." —— U.S. at ——, 100 S.Ct. at 249. We can only assume that this statement serves to repudiate the curious allusion in the *Cannon* statement to a drastically more liberal approach to "intent" where the first *Cort* criterion is satisfied. At the least, insistence upon the strict standard would seem reasonable in situations where (as opposed to *Cannon*) any "rights" of the class, at least potentially, may be adequately secured by the statute's express remedies. Consequently, we shall assume, *arguendo*, the correctness of appellants' concession and analyze this factor no further as well, directing our attention only toward the second and third *Cort* criteria.

the conventional analytical approach, however. In particular and most importantly, the fact that a private cause of action had *previously* been inferred under the old statutory scheme in connection with certain express provisions (such as §6b), which were incorporated or carried forward into the present structure, raises questions concerning the type of congressional intent we are bound to search for and where the axe should fall in the absence of *any* definitive evidence of intent.

As indicated in footnote 11, *supra*, an implied private right of action ordinarily may be recognized only upon clear evidence that Congress affirmatively intended to provide such a remedy. *See Touche Ross*, —— U.S. at ——, 99 S.Ct. at 2485. Customarily, "those who contend a statute has endowed them with a cause of action must establish their proposition," and their failure to demonstrate Congress' intent to provide a cause of action compels the denial of such actions. *Rogers* v. *Frito-Lay*, 611 F.2d at 1085.

Plaintiffs, along with the CFTC as *amicus curiae*,[14] contend here, however, that because courts had uniformly recognized private rights of action under the CEA prior to 1974, it is the *rejection* of a private right that would constitute a change in the status quo. Moreover, they suggest, Congress was or must have been aware of this judicial

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[14] Through its appearance here and in other litigation, along with its official pronouncements on the subject, *see* 41 Fed. Reg. 3994 (1976), the CFTC has made clear its belief that an implied right of action is available to private litigants. Ordinarily the interpretation of a statute by the agency charged with its administration would be entitled to great deference. *See United States* v. *Consumer Life Ins. Co.*, 430 U.S. 725, 752 (1977). The Supreme Court made clear in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n.27 (1977), however, that such deference was not to be accorded on the narrow issue, "reserved for judicial resolution," of whether an implied right of action should be recognized under the statute.

stance. Therefore, they argue, the onus here should be upon the defendants to prove a congressional intent to alter this status quo by *abrogating* this previously existing cause of action in the course of the 1974 revision. This argument has some appeal and has been accepted and deployed by several courts, all of whom eventually upheld the existence of an implied private right. *See, e.g., Leist,* —— F.2d at —— [slip op. at 4061]; *Curran* v. *Merrill Lynch,* 622 F.2d at 234; *Alken* v. *Lerner,* 485 F.Supp. 871, 877 (D.N.J. 1980).

While we agree that some account must be taken of the pre-1974 judicial decisions inferring a cause of action and any congressional awareness of those decisions, we do not believe plaintiffs' suggested mode of analysis is appropriate to this case. As is recognized by the courts employing this approach, *see, e.g., Leist,* —— F.2d at —— [slip op. at 4061-62, 4077-80], the thesis has its foundation in the traditional canon of construction that, absent express indications to the contrary, the reenactment of statutes in substantially the same form or their wholesale adoption into other statutory schemes are presumed to perpetuate and incorporate the judicial baggage that has accumulated in relation to those provisions. *See, e.g., Lorillard* v. *Pons,* 434 U.S. 575, 580-81 (1978); *Alabama Association of Insurance Agents* v. *Board of Governors,* 533 F.2d 224, 245 (5th Cir. 1976), *cert. denied,* 435 U.S. 904 (1978). We believe, contrary to Judge Friendly's assertions in *Leist,* —— F.2d at —— [slip op. at 4077-78], that the 1974 revision of the CEA simply does not fall within this paradigm.

The CFTCA was not a mere reenactment, but the "first complete overhaul" of the CEA. H.R. Rep. 975, *supra,* at 1. While it is true as noted earlier that many of the substantive measures, such as the antifraud provision, 7 U.S.C.

§ 6b, were left untouched or were carried forward virtually unchanged into the new regulatory structure, the immediate context of those provisions was drastically changed. Most significantly, as delineated in Part I.B., *supra*, the enforcement scheme—which an implied right presumably had been thought necessary to supplement—was dramatically altered and expanded. So significant a transfiguration of the extant statutory framework is, itself, a wholesale obliteration of the prior status quo and sufficient reason for declining to adopt plaintiffs' analytical approach, grounded as it is in the reenactment doctrine described above. *Stone* v. *Saxon & Windsor Group Ltd.*, 485 F.Supp. at 1221; *Smith* v. *Groover*, 468 F.Supp. 105, 112-113 (N.D. Ill. 1979) (rejecting the identical approach urged here by plaintiffs and CFTC as *amicus curiae*).[15] Our decision to continue to require proof of affirmative congressional intent to provide a private right of action is further grounded in a related reason, however, calling into play still another canon that guides inquiries into the existence of implied causes of action.

As outlined in Part I.B., *supra*, Congress greatly expanded the federal regulatory enforcement arsenal in the 1974 Act by expressly enacting several potent new judicial and administrative tools and strengthening many of those previously contained in the CEA. Most significantly, for the first time it expressly provided for remedial mechanisms—and administrative reparations procedure, 7 U.S.C. § 18, and the requirement that exchanges provide

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[15] *Cf. Georgia* v. *United States*, 411 U.S. 526, 532-33 (1973) (applying the reenactment doctrine to uphold perpetuation of Supreme Court interpretation of the provision reenacted, with some changes in context, where, unlike here, that prior interpretation had been the subject of "extensive deliberations" at least in hearings, and Congress had thereafter done nothing to alter or foreclose that interpretation).

the means for arbitration of small claims, 7 U.S.C. § 7a(11) —through which those injured by violations of the Act could seek compensation from the infractors.

"[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *TAMA*, —— U.S. at ——, 100 S.Ct. at 247. Thus Congress' express provision in 1974 of the numer judicial and administrative means for enforcing compliance with the antifraud and other provisions of the CEA—and most particularly the remedial mechanisms of arbitration and reparations procedures — in effect creates a presumption against the implication of yet another unexpressed judicial means of enforcement and remedy.[16] This "presumption" against finding an implied right of action may be overcome, but only upon "clear contrary evidence of legislative intent" affirmatively to provide such an implied right in addition to the express remedies. *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("*Amtrak*"). *Accord, e.g., TAMA*, —— U.S. at ——, 100 S.Ct. at 247; *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 419 (1975). Therefore, following the pattern of *TAMA*, we conclude that the onus remains upon plaintiffs to demonstrate "a clear and affirmative congressional intent to approve a private right of

[16] Indeed, the presumption is much more appropriately suited to this case than to the *TAMA* decision from which the formulation of the rule quoted in text was drawn. *Navigator Group Funds* v. *Shearson Hayden Stone, Inc.*, 487 F.Supp. at 420. There the Supreme Court declined to infer a private cause of action for damages largely on the basis of express enforcement provisions merely aimed at sanctioning violators of the substantive provisions. As the court in *Navigator Group Funds* observed, the express provisions of the CFTCA include *compensatory* remedial mechanisms which are more truly functional alternatives to the implied judicial forum sought by injured customers. 487 F.Supp. at 420.

action.[17] *Leist*, —— F.2d at —— [slip op. dissent at 4147] (Mansfield, J., dissenting). *Accord, Stone* v. *Saxon & Windsor Group Ltd.*, 485 F.Supp. at 1218, 1220.

The history of judicial recognition of a private cause of action under the CEA prior to 1974 justified some adjustment to and tailoring of the traditional formulation of the precise nature of congressional intent that must be shown. Rather than requiring establishment of a legislative intent to *create* a cause of action, we will require proponents of the implied right here to show, first, simply that Congress was actually aware in 1974 of this prior judicial recognition of an implied right of action, and second, that it approved these holdings and affirmatively intended to adopt or incorporate this extant, judicially articulated, right of action into the comprehensive express legislative enforcement scheme erected by the 1974 Act.[18] It is to this precise inquiry, in addition to the arguments and evidence put forth by plaintiffs, along with our sister courts' attempt to satisfy this inquiry, that we now turn our attention.

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[17] We adopt this approach and embark on our analysis fully cognizant that application of plaintiffs' suggested approach, as in *Leist* and *Alken*, very well might—indeed, probably *would*—produce a different final result.

[18] Given such proof, the actual correctness or incorrectness of these earlier judicial decisions would be largely immaterial. "For the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Brown* v. *General Services Administration*, 425 U.S. 820, 829 (1976). Thus, if Congress embraced such a cause of action and intended its perpetuation in the revised regulatory system, this affirmative intent renders completely irrelevant to our purposes the question of the propriety, under whatever standards, of the decisions originally giving birth to the cause of action. *Accord, Cannon* v. *University of Chicago*, —— U.S. at ——, 99 S.Ct. at 1964.

III. Congressional Intent

A. *Content of Act and Legislative History*

The direct sources from which plaintiffs might demonstrate the requisite congressional intent to provide, or to continue to provide, a private right of action are the legislative history, language and structure of the 1974 Act. Our study of these sources, however, guided by the plaintiffs' arguments, fails to yield any such "clear . . . evidence of legislative intent" to adopt such a private right.

Plaintiffs rely first on several passages of legislative history which, they argue, plainly demonstrate that Congress was aware in 1974, during its deliberations on the CFTCA, of the consistent judicial recognition of implied private rights under the CEA prior to that time. They point initially to two statements in H.R. Rep. No. 975, *supra*, at 46, 48, referring to the growth of private suits against contract markets for their failure to enforce their own rules as well as for actions taken in emergency situations. Representative Poage, the sponsor of H.R. 11955 (the version of the legislation that later passed the House as H.R. 13113, 93d Cong., 2d Sess. (1974)), also made essentially the same observation on the House floor. 119 Cong. Rec. 41333 (1974). Plaintiffs also point to several mentions of the existence of a private right of action by witnesses before the House and Senate Committees conducting hearings on the commodity futures legislation. Hearings before the Senate Committee on Agriculture and Forestry on S.2485, S.2578, S.2837, and H.R. 13113, 93d Cong., 2d Sess. 415 (1974) (hereinafter "Senate Hearings") (statement of Alvin Donahoo, Minneapolis Grain Exchange, noting court litigation as extant alternative to proposed arbitration procedures); Hearings Before the Comm. on Agriculture on H.R. 11955, 93d Cong., 2d Sess. 249, 321 (1974) (hereinafter

"House Hearings") (statements of representatives of international commodity exchanges and the Continental Grain Company, respectively, observing that in addition to the proposed reparations and exchange arbitration procedures "complainants of course have access to the courts." p. 249, and that "courts . . . have already held they have jurisdiction over private complaints," p. 321). *See also* Senate Hearings, *supra*, at 737, 746 (statement of Professor Ray Schotland, arguing for an express private right of action and assurance "that Federal and State courts are *still* open" (emphasis added)).

Stated charitably, we are less certain than are the plaintiffs and several of our sister courts[19] that these few fleeting references—sometimes cryptic and all comparatively isolated among the hundreds of pages of testimony and debate that comprise the legislative history of the 1974 Act—are sufficient to establish that the *entire* Congress was even aware of and duly considered the existence of any previously inferred cause of action in its deliberations and vote upon the CFTCA. *See SEC* v. *Sloan*, —— U.S. ——, ——, 98 S.Ct. 1702, 1712-14 (1978);[20] *Tennessee Valley Authority* v. *Hill*, —— U.S. ——, ——, 98 S.Ct. 2279, 2300-01 (1978). Plainly, the consideration of the prior judicial

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[19] *E.g.*, *Leist* v. *Simplot*, —— F.2d —— at —— [slip op. at 4074-78]; *Curran* v. *Merrill Lynch*, 622 F.2d at 234; *Alken* v. *Lerner*, 485 F.Supp. at 877; *Smith* v. *Groover*, 468 F.Supp. at 113.

[20] In *Sloan*, the Supreme Court rejected the SEC's contention that its longstanding interpretation of a particular section of the Securities Exchange Act of 1934 had been essentially incorporated into that section by Congress' reenactment of the provision in substantially the same form. In doing so, even though the Senate committee overseeing the reenactment had not only acknowledged but expressly approved of the SEC's construction in its official report, the Court declined "to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents." —— U.S. at ——, 98 S.Ct. at 1713.

interpretations here involved much less attention, even among the legislators and witnesses noted above, than the "extensive [legislative] deliberations" (albeit in hearings) of the Supreme Court's prior interpretation of a provision of the Voting Rights Act from which, in *Georgia* v. *United States*, 411 U.S. 525, 532-33 (1973), the Court presumed general congressional awareness and acceptance of that interpretation in the reenactment of the provision. *See* note 15, *supra*.

Nonetheless, even assuming that these remarks demonstrate Congress' awareness of the prior judicial recognition of an implied right under the CEA[21] and that the first prong of our inquiry (delineated in Part II, *supra*) is satisfied, these passages unquestionably give no indication that Congress *approved of* and intended to perpetuate such actions as a part of the elaborate express enforcement scheme that it was in the process of fashioning.[22] Proof of such approval is, of course, the vital element of congressional intent which plaintiff must establish.[23]

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[21] In the context of a similar situation, the Supreme Court stated in *Cannon* that "[i]t is always appropriate to assume our elected officials, like other citizens, know the law"—referring to the prior judicial construction of a statute upon which the one under the Court's consideration had been patterned. —— U.S. at ——, 99 S.Ct. at 1957-58 (dictum). This suggests that awareness of the prior judicial constructions recognizing an implied right of action under the CEA apparently may merely be *ascribed* to Congress. However, the wisdom of *imputing* to Congress the knowledge upon which we then, in turn, *assume* that legislation is predicated, seems dubious. *See SEC* v. *Sloan*, —— U.S. at ——, 98 S.Ct. at 1712-14, and note 20, *supra*.

[22] The polarity between the analytical approaches and concepts of burden of persuasion employed by this court and the Second Circuit in *Leist* is epitomized by Judge Friendly's observation, respecting the passages of legislative history just examined, that "[i]t matters little whether this be called recognition or approval [of prior implied rights]." —— F.2d at —— [slip op. at 4075-76].

[23] Indeed, the passages in the H.R. Rep. 975 as well as Representative Poage's remarks evince a disparagement of such actions,

For their demonstration of congressional approval and adoption of the judicially created right of action, then, plaintiffs rely almost totally on the jurisdictional savings proviso of 7 U.S.C. § 2. Set amid the ascription of exclusive jurisdiction over futures trading to the CFTC, this proviso states that "[n]othing in this section[24] shall supersede or limit the jurisdiction conferred on courts of the United States . . . ." This, plaintiffs contend, affirmatively demonstrates the intent of Congress to retain the power of the courts to entertain private actions under the CEA. *See* A. Bromberg & R. Lowenfels, Securities Fraud & Commodities Fraud § 461 at 82.362-.363 (1979).

The language of the proviso does not clearly evince an intent to approve of implied private actions, however,[25] and the legislative history relevant to this specific proviso indicates that it probably was intended to serve another purpose entirely. The House, Senate and Conference reports all are mute as to the purpose behind the proviso, which was added to H.R. 13113 in the Senate. Allusions to the pro-

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at least insofar as they had presented an impediment to effective exchange self-regulation—quite likely a factor in the exclusion of exchanges from the ranks of those suable by states under 7 U.S.C. § 13a-2 and those susceptible to the administrative reparations procedure of 7 U.S.C. § 18.

[24] Even though the proviso explicitly provides only that nothing "in this *section*" was meant to supersede extant court jurisdiction, the legislative history illustrates that Congress' intention was that nothing in the *Act* was to be taken to diminish that jurisdiction. S. Rep. No. 1131, 93d Cong., 2d Sess. 23, *reprinted in* [1974] U.S. Code Cong. & Ad. News 5843, 5863; 120 Cong. Rec. 34737, 34997 (1974).

[25] If we may indulge in so simplistic an observation: it is quite a different matter to remove the jurisdiction of courts over even a limited subject area like futures trading, than to eliminate a cause of action within that subject area. By the same token, a provision such as that in § 2, which explicitly directs the retention of jurisdiction, need not also denote the retention of an individual cause of action.

vision during debates on the floor are similarly unenlightening.

Only recourse to the attenuated source of hearing testimony gives any hope of insight. Plaintiffs argue, therefore, that the proviso was enacted in response to the admonitions of Senator Dick Clark and Professor Roy Schotland that some sort of express assurance should be given complainants that the courts were still open to them under the new Act. Senate Hearings, *supra*, at 205, 737 & 746.[26]

Rosenthal contends, on the other hand, that the more likely stimulus for the proviso was the statement of the Chairman of the House Judiciary Committee, Representative Peter Rodino, Senate Hearings, *supra*, at 257-60, and the testimony of Deputy Assistant Attorney General Keith Clearwaters directly attacking the exclusive jurisdiction provision of § 2 to which the proviso was eventually added, *id.* at 663-64. The concern of both these witnesses was that the all-encompassing language of § 2, allocating to the CFTC exclusive jurisdiction over the futures trade, was so broad that it even "could be interpreted to deprive Federal courts of their jurisdiction under the antitrust laws and to deprive Federal and State courts of jurisdiction to enforce

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[26] Senator Clark testified that,

> "Often the most effective enforcement tool is a private suit where the plaintiff can recover three times his actual damages. The McGovern bill also authorizes them. Unfortunately, the House bill not only does not authorize them, but section 201 of the bill [now 7 U.S.C. § 2] may prohibit all court actions. The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate."

Senate Hearings, *supra*, at 205.

Professor Schotland, while addressing the proposed reparations procedure, observed more generally that "[i]f you do choose to retain [the reparations mechanism] . . . there should be explicit language in the statute that federal and state courts are still open if a complainant prefers to go to trial there." *Id.* at 737, 746.

contract and commercial law rights" in the futures area. *Id.* at 663. Because these statements, as opposed to those relied upon by plaintiff, are derived from extensive and pointed attacks on the very section that the proviso later served to amend and because they, like the proviso itself, are directed to the question of jurisdiction as opposed to a single cause of action, *see* note 25, *supra*, the Rodino-Clearwaters' statements do appear to be the somewhat more likely source for the proviso.

Unfortunately, we may only speculate since, as stated above, Congress gave us no indication of which, if either, of these sets of comments spurred it to add the proviso of § 2. We are likewise unable to deduce the answer with any certainty solely on the basis of the nature of the comments. Even this statement and the sheer speculativeness of the true answer, however, effectively blunt plaintiffs' reliance on the § 2 proviso as a "clear and affirmative" indication of congressional intent to approve or adopt an implied cause of action.

Plaintiffs find little support elsewhere in the legislative history of the 1974 Act.[27] On the other hand, appellant

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[27] Some additional purported inferences of congressional awareness and approval of an implied cause of action have been noted by other courts. We find none of them persuasive. For example, both the *Leist* and *Curran* majorities presume, from various statements throughout the legislative history to the effect that the purpose of the CFTCA was "to strengthen" regulation, *e.g.*, H.R. Rep. 975, *supra*, at 53-54, that any existing enforcement mechanisms were meant to be maintained. *Leist*, —— F.2d at —— [slip op. at 4080-81], *Curran* v. *Merrill Lynch*, 622 F.2d at 232. It is just as reasonable to infer, however, that this "strengthening" of the extant regulatory structure was to be accomplished by the centralization in the federal government of a much-enlarged express enforcement structure, and that the "strengthening" need not include private actions—especially in light of the reparations procedure.

A second example is the reliance in *Leist*, —— F.2d at —— [slip op. at 4084-85], for instance, on the observation of Senator

Rosenthal seeks to solidify its case further by arguing that at least one aspect of that legislative history indicates an intent to deny the existence of a private cause of action.

In the process of enacting the CFTCA, Congress considered, but failed to adopt, no fewer than three bills containing express private rights of action. H.R. 11195, 93d Cong., 1st Sess. § 17(3) (1973); S. 2837, 93d Cong., 1st Sess. § 505 (1973); S. 2578, 93d Cong., 1st Sess. § 203(3) (1973). The weight to be given to a failure to enact such a provision—not an outright rejection by vote of either house—is unclear. *Compare Amtrak*, 414 U.S. at 460-61 ("Committee's deliberate failure to adopt that proposal . . . cannot but give weight" to the committee's disapproval of the principle contained in the proposal) *with Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381-82 n.11 (1969) ("unsuccessful attempts at legislation are not the best guides to legislative intent"). Whatever clear inference might ordinarily be drawn from such an occurrence is largely undercut here by the fact that each of the bills provided for treble damages, at least for willful violations of the Act. Congress' refusal to adopt these bills might just as reasonably be presumed to have derived from an opposition to treble damages as

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Talmadge that "[i]t is hoped that 'giving the Commission this [reparations] authority will somewhat' lighten the burden upon the courts . . . ." 120 Cong. Rec. 30459 (1974). The argument raised from this is that if the reparations procedure had been intended fully to displace rather than supplement implied judicial actions, the Senator would have *known* rather than "hoped" that the burden on the courts would be significantly lightened. Aside from the fact that the Senator's statement concludes by noting, however, that the entire appeal and enforcement process remains in the courts, this particular statement was made with respect to a bill in which the right of appeal from a reparations proceeding lay initially to *district court*. H.R. 13113, *supra*, § 106. Thus while one might hope for a reduction in judicial time commitments, there was little reason to expect a decreased docket of cases.

from an opposition to the damage remedy itself. *Alken* v. *Lerner*, 485 F.Supp. at 877. Consequently, this indicator of Congress' purported intent to deny private rights of action is hardly less equivocal than those relied upon by plaintiffs to show the opposite intent.[28]

Having failed to distill any tangible evidence of affirmative congressional intent from the legislative history, language or structure of the 1974 Act, plaintiffs next argue that a congressional purpose to provide a cause of action may be inferred simply from the context or *zeitgeist* in which the legislation was enacted. They rely for this assertion on the discussion in *Cannon* v. *University of Chicago*, —— U.S. ——, ——, 99 S.Ct. 1946, 1958 (1979), to the effect that statutes, such as the CFTCA, enacted during a period when the courts were much more liberal in their approach to implied rights of action, *see, e.g., J. I. Case* v. *Borak*, 377 U.S. 426, 433 (1964), must be judged in light of that "con-

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[28] Each party seeks to embellish the basic analysis above, to some extent. Plaintiffs contend, supported by some district courts, that Congress' failure to enact these express provisions actually provides evidence that Congress recognized and approved the existing implied right and saw no need to supplement or expand it. *See Navigator Group Funds*, 487 F.Supp. at 423, *quoting*, *Smith* v. *Groover*, 468 F.Supp. 113; *Alken* v. *Lerner*, 485 F.Supp. at 877. This is a very attenuated inference, however, and we join in the statement of the Supreme Court in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, 478 (1959): "we do not think that from the failure of Congress to grant a new authority any reliable inference can permissibly be drawn to the effect that any authority previously claimed was recognized and confirmed."

Rosenthal, on the other hand points out that the reparations procedure that was eventually enacted first made its appearance in H.R. 11955, immediately after the failure and withdrawal of the express judicial cause of action in H.R. 11195. *See Fischer* v. *Rosenthal & Co.*, 481 F.Supp. at 56. While this very well could be mere coincidence, one might infer from the chain of events that the reparations procedure was indeed viewed by Congress as displacing any judicial forum. The legislative history contains no express discussion elucidating any relationship between the two.

temporary legal context." [29] From this, they contend that it must be presumed, in the absence of contrary evidence, that Congress expected the judiciary to supply any cause of action consistent with the prevalent pattern of interpretation of that time. *Accord, Navigator Group Funds* v. *Shearson Hayden Stone,* 487 F.Supp. at 421 (applying the *Cannon* thesis to CFTCA); *Alken* v. *Lerner,* 485 F.Supp. at 876-77 (same).

We agree that the liberal judicial climate in which the CFTCA was born requires us to be more solicitous and sensitive to indications of Congress' desire to create a cause of action. Indeed, any indication that Congress actually intended merely to leave the question to the judiciary to be resolved according to its contemporary rules of construction, while clearly inadequate under current standards, would likely be sufficient to carry the day here.

The prior judicial activism and our present duty of solicitousness because of that, however, cannot alter the constitutional requirement, *see* note 11, *supra,* that a cause of action be created only by Congress. There must be some expression of affirmative congressional intent either to provide a cause of action or at least to rely on the context of judicial activism contemporary to the enactment (though the latter is somewhat unrealistic). In *Cannon,* for example, the Court observed that Congress "*explicitly* assumed that [the statute in question] would be interpreted and applied as" had the statute upon which it was patterned, including the judicial recognition or creation of an implied cause of

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[29] The *Amtrak* case was handed down during congressional deliberations on the CFTCA. However, the restrictive trend toward implied rights of action initiated there and carried forward with increasing intensity through later cases such as *Barbour, Cort,* and others up to *TAMA* and *Touche Ross,* could not have been evident to or anticipated by Congress at the time it enacted the CFTCA.

action thereunder. —— U.S. at ——, 99 S.Ct. at 1956-57 (emphasis added). We have received no such message from the enactors of the CFTCA.

Finally, plaintiffs contend that the legislative history of the 1978 amendments—specifically certain remarks of Senator Huddleston and Leahy during debate on the Senate floor—demonstrate Congress' assumption and understanding that implied private actions are available under the Act. Initially, we note that the views of subsequent Congresses (and particularly the isolated remarks of individual legislators) hardly provide the most persuasive evidence of the intent of the enacting Congress. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, —— U.S. ——, ——, 100 S.Ct. 2051, 2060-61 (1980); *Rogers* v. *Frito-Lay*, 611 F.2d at 1080-81. However, virtually every court to consider the issue before us since 1978 has taken into account, with varying degrees of deference, the legislative history of the 1978 amendments. Moreover, we are reminded by other Supreme Court opinions that "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, . . . such views are entitled to significant weight, . . . and particularly so when the intent of the enacting Congress is obscure." *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, —— U.S. ——, ——, 100 S.Ct. 800, 814 (1980) (citations omitted). *Accord, Cannon* v. *University of Chicago*, —— U.S. at —— n.7, 99 S.Ct. at 1952 n.7 (subsequent legislative history not as pertinent as contemporary history, but helpful to some extent). Therefore, we shall attempt to glean what we can from this field of legislative material.

The remarks in question of Senators Huddleston and Leahy, reproduced in the margin,[30] do indicate a clear as-

[30] While introducing the amendment raising from $2,500 to $5,000 the amount necessary to secure a full-fledged hearing in the reparations procedure, 7 U.S.C. § 18(b), Senator Huddleston

sumption on the part of these two legislators that an implied private right of action was available under the CEA even after the 1974 revision. There is no indication elsewhere, however, that this assumption was shared by the remainder of Congress. In fact, certain other aspects of the 1978 legislative history imply the *absence* of such an assumption on the part of Congress as a whole.

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discussed the backlog problem that the amendment was designed to help alleviate:

> "Compounding the undue stress placed on the reparation program, certain Federal district courts have taken the unfortunate position that Congress intended reparations to be the exclusive forum for adjudicating commodity customer claims. [citations omitted.] In order to alleviate the burden on the Commission's reparation program, the committee adopted an amendment that provides—for reparation complaints where the amount claimed as damages does not exceed $5,000—that a hearing be held only on the novel or basic issues that are determinative of the case. Thus, an aggrieved commodity customer will be able to obtain more expeditious treatment of his claim should the customer elect to pursue a claim in reparations rather than to proceed to arbitration or pursue in court the private right of action which has been judicially implied for violations of certain provisions of the Commodity Exchange Act, or which in the future courts may recognize for other provisions of the act."

124 Cong. Rec. 10537 (1978).

Senator Leahy, in discussing the new provision expressly allowing states to pursue *parens patriae* actions for damages on behalf of their residents, observed:

> "The exemption from State suits provided to contract markets is justified due to the deterrent effect on contract markets caused by Commission regulation, institution of Commission enforcement proceedings, and the implied private rights of action that may be brought against those contract markets that fail to discharge their duties under the Commodity Exchange Act. In those actions brought by a State under this bill, a customer who makes an informed, voluntary election to have his State sue on his behalf to recover monetary damages for a particular violation would thereby extinguish that person's other alternatives for redress: arbitration reparations, or judicially implied private rights of civil action under the Act."

124 Cong. Rec. S.16527 (daily ed. Sept. 28, 1978).

For example, the Senate report on the bill, S. Rep. No. 850, 95th Cong., 2d Sess., reprinted in [1978] U.S. Code Cong. & Ad. News 2087, twice catalogs the means by which "customers are afforded protection" under the CEA, and each time conspicuously omits to mention an implied private right of action. *Id.* at 12-13, 32 (the latter passage states, in reference to a provision not included in the bill as enacted, that "[a]ggrieved customers . . . would have the choice of seeking resolution of their claims through association arbitration or reparations proceedings or a Commission reparations proceeding"). *See also* H.R. Rep. No. 975, *supra*, at 22 (similarly noting that the reparations procedure was "designed to supplement the informal 'settlement procedures' contemplated of the contract markets . . . which are required under other sections of the legislation," omitting any reference to such a procedure being supplementary to any judicial forum).

A second indicator that the assumption expressed by Senators Huddleston and Leahy was not one shared by the remainder of Congress is found in the 1978 amendment expressly providing a cause of action to the states, 7 U.S.C. § 13a-2.[31] Section 13a-2(2) provides exclusive jurisdiction to the federal courts for suits based on violations of the CEA and brought by states under this section. No such

[31] It has been suggested that the passage of the express cause of action for states in § 13a-2 demonstrates that "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly," *Touche Ross*, —— U.S. at ——, 99 S.Ct. at 2487, and it obviously, therefore, did *not* intend to provide a cause of action for individuals under the CEA. *See, e.g., Stone* v. *Saxon & Windsor Group Ltd.*, 485 F.Supp. at 1220-21. While we are not insensitive to the logic of this position, the legislative history of § 13a-2 indicates that a primary motivator in making explicit the right of states to sue may have been the need to overcome various common law prerequisites and restrictions on such *parens patriae* suits. *See* S. Rep. No. 850, *supra*, at 25. *Accord, Leist* v. *Simplot*, —— F.2d at —— [slip op. at 4098-99].

provision exists with respect to the Act generally. The rationale behind this reservation of exclusive jurisdiction is two-fold: (1) to draw upon the extensive experience developed exclusively in federal courts in similar cases under the Securities Exchange Act of 1934 under which they similarly hold exclusive jurisdiction, 15 U.S.C. § 78aa, and (2) by means of recourse to this experience, to evolve a unified "coherent body of [decisional] law" under the CEA. S. Rep. No. 850, *supra*, at 25. In view of these goals, it would be anomalous indeed for Congress to require exclusive jurisdiction only of these relatively infrequent suits by states while continuing to countenance an implied cause of action, without such a restriction, for any individual who cares to sue. The natural inference is, therefore, that no such individual suits were contemplated.

B. *Consistency With Statutory Goals*

Our final inquiry is that directed by the third *Cort* criterion. Like our excursion into more direct indicators of legislative intent, this foray also yields only conflicting or equivocal results. It is, of course, true that the recognition of an implied private right of action for damages would provide another, perhaps useful, enforcement tool in harmony with the aim of the CEA to protect futures customers from fraud and market manipulation. *Curran* v. *Merrill Lynch*, 692 F.2d at 234-35.[32]

As noted earlier, however, a second goal of the 1974 legislation was to create a "uniform regulatory structure" evolving a coherent body of law coordinated by the CFTC. S. Rep. No. 850, *supra*, at 10, 25; H.R. Rep. No. 975, *supra*, at 1. In order to effectuate this purpose, "[t]o assure that the

[32] In light of the reparations procedure it is *not* true, however, that such private actions are "necessary" to effectuate the purposes of the statute, as has sometimes been required. *See United States* v. *Capelleti*, 621 F.2d at 1317.

body of decisional laws developed under [the CEA] would be coherent and consistent with national policy," the Senate version of the 1978 amendments initially required states to receive approval from the CFTC before they could bring an action under § 13a-2. S. Rep. No. 850, *supra*, at 26. Although this provision was not incorporated into the bill as finally enacted, the same function was to be served by the provision in the Act as passed, § 13a-2(3), requiring states to notify the Commission of their intent to file suit and guaranteeing the Commission's right to intervene in any such suit.

From these restrictions and the remarks in the Senate report, it is apparent that Congress perceived even infrequent uncontrolled suits for damages even by the state governments as a threat to the goal of developing a coherent and consistent body of law. Yet, as was the case with respect to the similar concern over the exclusivity of federal jurisdiction, above, no such constraints or safeguards would be placed by the statute as presently constituted on the potentially much more numerous and diverse suits that would be lodged pursuant to an implied private cause of action. In this situation we are counselled by the Supreme Court's admonition in *Santa Clara Pueblo* v. *Martinez*, —— U.S. ——, ——, 98 S.Ct. 1670, 1680 (1978): "[w]here Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other."

IV. Conclusion

The foregoing analysis of the language, structure and legislative history of the 1974 version of the CEA and its 1978 amendments obviously has yielded a result that might be described as emphatically equivocal. Although some in-

dividual passages or aspects of the Act appear to give some insight, these inferences frequently conflict with those from other passages or, upon closer examination, their apparent persuasiveness dims or vanishes. Chief Justice Marshall once observed that "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived . . . ." *United States* v. *Fisher*, 2 Cranch. 358, 386 (1805), *quoted in*, *Brown* v. *General Services Administration*, 425 U.S. 820, 825 (1976). After our analysis of the legislative material and decisions of other courts on this question, we might add that in this metaphysical pursuit of prescience the mind often snatches at shadows and mirages in its attempt to discern evidence of such congressional design—a singularly inappropriate base upon which to predicate an implied private cause of action.

The net result of our study and deliberations in this case is the determination that the language and legislative history of the CEA and CFTCA, dissected by all of the varied and even conflicting canons of construction, simply do not provide any clear indication of congressional intent either to approve or deny an implied right of action. In such a case, as explained in Part II, *supra*—given the absence of clear evidence of the requisite affirmative congressional intent to create or provide such a cause of action—we are bound to refuse plaintiffs' suit.

Accordingly, the order of the district court denying appellants' motion to dismiss plaintiffs' claims under the CEA is REVERSED and the case REMANDED.

Office-Supreme Court, U.S.
FILED
JUL 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-203

In the Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
PETITIONER,

VS.

J. J. CURRAN AND JACQUELYN L. CURRAN,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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JOINT APPENDIX

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UNITED STATES DISTRICT COURT
RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1976		
April 5	1.	Complaint, summons issued.
April 7	2.	Marshal's return.
May 24	3.	Notice of deposition upon oral examination and proof of mailing.
May 24	4.	Deft's motion to dismiss or, in the alternative, to dismiss in part and stay proceedings pending arbitration, affidavit, proof of service and notice of hearing set for June 7/76. BA
June 18	5.	Notice of hearing on deft's motion to dismiss, or in the alternative, to dismiss in part and stay proceeding pending arbitration for Sept. 13/76, with proof of service.
June 21	—	Deft's motion to dismiss adj. to Sept. 13/76.
July 14	6.	Notice of adjournment & rescheduling of deft's motion to dismiss, etc./reset for Sept 13/76
Sept 13	8.	Deposition of Lawrence McMann
Sept 22	9.	Deft's Reply memorandum in support of its motion to dismiss and to stay proceedings with affidavit and proof of service. D.D. 9/23/76
Sept 24	10.	Plfts. response to defts. reply memorandum. with attachments. D.D. 9/27
Sept 27	—	Deft's motion to dismiss heard & taken under advisement. D.D. 9/28/76 Thornton, J.

Dec 27	11.	Memorandum re motion to dismiss & stay proceedings. DD. 12/28/76
1977		
Jan 12	13.	Plfts' motion for re-hrg. &/or to amend judgment & for leave to file amended &/or supplemental complaint with proof of service, B/A & attach. DD.1/12/77
Feb 2	14.	Deft's memorandum in opposition to plfts' motion for rehrg. & for leave to file amended complaint. DD.2/2/77
Feb 15	15.	Plft's reply memorandum in support of motion for re-hrg. &/or to amend judgment & for leave to file amended &/or supplemental complaint with proof of service. DD.2/15/77
Feb 16	16.	Order denying plfts' motion for rehrg. &/or to amend judgment & for leave to filed amended & /or supplemental complaint. DD. 2/17/77 Thornton, J.
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Feb 23	—	Order dismissing Cts 4, 5 & 6 and staying proceedings, drafted DD.2/24 Thornton, J.
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Mar 21	20.	Plfts' petition for modification of order of 2/23/77 with proposed order attached. DD.3/21/77
Mar 23	22.	Plfts' notice of appeal re order denying plfts' motion for a rehearing (#16) DD.3/30/77

Mar 23	23.	Bond on appeal-surety- Hoops & Hudson in $250.00.DD.3/30/77
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Mar 29	25.	Letter re appeal. DD.3/30/77
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June 30	34.	Notice of pretrial conference for 9/22/80. DD.7/1/80
July 14	35.	Stip. & Order to stay pending consideration by the U.S. Supreme Court of deft's petition for a writ of certiorari. DD.7/15/80 Boyle, J. (IN PLACE OF JUDGE THORNTON)
1981		
May 6	36.	Order from U.S. Supreme Court allowing certiorari filed on 4/20/81. DD.5/7/81

GENERAL DOCKET
United States Court of Appeals
for the
Sixth Circuit

DATE	
1977	
5/28	*Certified Record* (1 vol. pleadings), filed; and cause docketed
6/3	Appearance of R. Saslow for appellee
6/9	Appearance of R. Hudson for appellants
7/5	Brief and appendix (25) of appellants (p-7/1)
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1/12	Motion of appellants for leave to file a supplemental brief (m-1/11) (Motion granted JPH 1/16)
1/25	Supplemental brief (25) of appellants (m-1/23)
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1979	
1/18	Motion of appellant for adjournment of oral argument (m-1/16) (1/22/79 Motion for adjournment of oral argument is granted. It is ordered that the appeal be assigned for oral argument in the April 1979 session of the Court. Weick, J. 1/25)
4/19	Cause argued by R.A. Hudson for Appellant, by R.P. Saslow for Appellee and case submitted to the Court (Before: Lively, Engel and Phillips, JJ.)

5/12	Judgment of District Court is affirmed in part, reversed in part and remanded for further proceedings (Lively, Engel and Phillips, JJ.)
5/12	Opinion by Engel, J. (Phillips, J. filed a separate opinion, concurring in part and dissenting in part)
6/09	Mandate issued (No costs taxed)
6/09	Opinion with mandate
8/18	Notice of filing petition for certiorari 8/9/80 (Sup.Ct.No. 80-203)

1981

5/01	Certified copy of Sup. Ct. order granting certiorari 4/20/81
5/01	Copy of the above order issued to District Court

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

J.J. CURRAN and JACQUELYN L. CURRAN, individually and as trustees of the JOHN J. CURRAN LIVING TRUST and JACQUELYN L. CURRAN LIVING TRUST,
Plaintiffs,

vs. Civil No. 670683

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a Delaware corporation,
Defendant.

COMPLAINT

NOW COME plaintiffs, J.J. CURRAN and JACQUELYN L. CURRAN, by and through their attorneys, HOOPS & HUFF, and for their Complaint against Defendant herein state as follows:

FACTS ALLEGED WITH RESPECT TO ALL COUNTS

1. Plaintiffs, J.J. CURRAN and JACQUELYN L. CURRAN, are residents of the State of Michigan and are the trustees of the John J. Curran Living Trust under an agreement dated March 2, 1972, as amended, and the Jacquelyn L. Curran Living Trust under an agreement dated March 2, 1972, as amended.

2. Defendant, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., is a corporation organized and existing by vir-

tue of the laws of the State of Delaware and is conducting business in the State of Michigan pursuant to the authority granted to it.

3. Defendant is a member firm of the New York and American Stock Exchanges, the Chicago Mercantile Exchange, and other stock and commodity exchanges, and is engaged in the business of purchasing and selling commodities, funds and securities for and on behalf of its customers, for profit.

4. The amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

5. Jurisdiction is conferred upon this Court by Section 27 of the Securities Exchange Act of 1934 (the "Exchange Act"); by Section 22(a) of the Securities Act of 1933 (the "Securities Act"); by Sections 1331, 1332, and 1337 of Title 28 of the United States Code and by pendent jurisdiction.

6. The acts complained of herein occurred within this judicial district.

7. This action is brought within all applicable limitations periods.

8. During the period of time involved herein, the Defendant broker-dealer employed the individuals named herein, among others, in the following capacities, all of whom acted in the matters complained of herein, within the scope of their employment, and within the scope of their authority on behalf of the Defendant:

A. Lawrence McMann — Customer's account executive

B. James Owen — Manager in charge of Fisher Building office, Detroit, Michigan

C. Thomas Dougherty — Commodities specialist

D. George W. Stover — Commodities specialist

E. Jeffrey Coo — Commodities specialist in New York office.

9. Prior to March, 1973, Plaintiff J.J. Curran was utilizing the services of Manley, Bennett & MacDonald, a New York Stock Exchange Member firm, in connection with an offering of limited partnership interests in cattle (the "cattle offering") and as investment manager of the J.J. Curran Crane Company Pension Plan.

10. In March, 1973, Plaintiff J.J. Curran became interested in transferring the handling of the cattle offering from Manley, Bennett to another firm and contacted Defendant in that behalf.

11. In response to Plaintiff J.J. Curran's inquiry, Plaintiff was contacted by Lawrence McMann, Thomas Dougherty and James Owen. Said employees of Defendant informed Plaintiff during a visit to the cattle ranch and on other occasions that they did not know whether Defendant would agree to handle the cattle offering, but that the prospects for same would be greatly improved if Plaintiff would shift to Defendant the management of the pension plan and open a brokerage account or accounts with Defendant utilizing the large amount of cash which Plaintiff had invested in a savings and loan institution.

12. During the course of said visit to the cattle ranch and on other occasions, James Owen, Thomas Dougherty and Lawrence McMann, acting for and on behalf of Defendant, made the following representations to Plaintiff J.J. Curran, among others, to wit:

a. That Defendant Broker had a great deal of experience in the trading of commodities and that they did the largest amount of commodity trading of any financial concern in the United States.

b. That Defendant had a full time commodity department and Guided Account Unit thereof offering a specialized trading program in commodities for investors who lacked the necessary background to invest successfully in commodity futures, and that under such program Defendant's traders did all the work and investment decision making.

c. That Defendant Broker had the greatest expertise in commodities trading and the largest statistical commodity department in the world, and made further representations to that effect in many of its brochures and advertising.

d. That Defendant Broker would assign its most competent and experienced commodity specialists to Plaintiffs' accounts who would trade and manage Plaintiffs' accounts based upon the expert, scientific and comprehensive research conducted at and transmitted from, Defendant's New York office.

e. That in the event Plaintiff opened and maintained an account with Defendant Broker, he would have to follow each and every trading suggestion but by so doing, he would achieve a 30% to 40% profit on his money and that the majority of people maintaining commodities accounts with Defendant were making that much profit and more.

f. That because of the safeguards built into the trading system employed by Defendant, Plaintiff would not suffer large losses and in no event would he lose more than 10% of the value of the account.

g. That the Defendant Broker, through its employees, would maintain strict surveillance and supervision over Plaintiff's account and that Plaintiff would be informed of all trades prior to their oc-

currence so that he could agree to the same in accordance with the conditions governing said account under Defendant's specialized guided account trading program, and that Plaintiff would be constantly and continuously kept advised of all developments affecting his account as they occurred.

13. Based upon said representations as aforesaid, and in direct reliance thereon, Plaintiffs opened, on or about April 5, 1973, a brokerage account or accounts with Defendant for the John J. Curran Living Trust ("J.J.'s account") for the purpose of trading in commodities and deposited $100,000 therein. Thereafter, on August 20, 1973, Plaintiffs opened other brokerage accounts with Defendant for the Jacquelyn L. Curran Living Trust, and for the purpose of trading in commodities.

14. Thomas Dougherty was assigned by Defendant to handle these accounts locally in Detroit, and thereafter George Stover was in charge thereof.

15. Upon information and belief, all trading decisions in said accounts were made by commodity traders employed by Defendant in its New York office including, among others, Jeffrey Coo.

16. Defendant had and exercised such control over said accounts in that all investment decisions were made by it with complete reliance upon all of Defendant's decisions by Plaintiffs.

17. Plaintiff never initiated or suggested any trade made by Defendant in the said commodity accounts.

18. That all if not substantially all of the traders in Plaintiffs' accounts were made on margin.

19. Said representations of Defendant as aforesaid were false and fraudulent since in truth and fact the Defendant Broker:

a. Did not have the intention to and actually did not base its trading Plaintiff's accounts upon its expert, scientific and comprehensive research, but rather based upon the wilful and malicious desire and scheme on the part of Defendant to generate large commissions from a large trading volume and frequency.

b. Did not have the intention to and actually did not observe any of the aforesaid "safeguards" but traded in Plaintiff's accounts in complete disregard of the "safety margins" and technical loss limiting procedures which Plaintiffs believed would protect them from a sudden and major decline in the value of their accounts.

c. Did not inform Plaintiffs of all trades prior to their occurrence but frequently made large trades and informed Plaintiffs of their occurrence after they had occurred.

d. Did not keep Plaintiffs constantly and continuously advised of all developments affecting their accounts as they occurred.

e. In truth and fact, the Plaintiffs, after establishing accounts with the Defendant, actually lost great sums of money as a result of the reckless, negligent and improper actions of the Defendant in trading in said accounts contrary to the frequently expressed wishes of Plaintiffs and with the sole purpose of generating commissions for itself.

f. Misrepresented and failed to disclose the fact that the overwhelming majority of its customers and others customers trading in commodity futures lost money.

g. Engaged in purchasing and selling commodity futures in a volume and frequency which were excessive in view of the character of Plaintiffs accounts and their needs and objectives, purchased and sold identical commodity futures repeatedly and within short periods and switched from one investment to another of equal or inferior quality without justification other than to profit itself by earning commissions.

h. Failed to select and recommend the investments which were suitable and consistent with Plaintiffs' needs and objectives.

20. For a while some of Plaintiff's accounts were profitable, and Plaintiffs withdrew the sum of $101,007.80 therefrom in September and October of 1973. After said withdrawal Plaintiffs accounts had a value in excess of $175,000.

21. Plaintiffs were concerned about maintaining the value of their accounts and at a time or times when the account declined in value, Plaintiff J.J. Curran requested Defendant to halt trading activity and "cash out" the account in order to preserve the value that remained. Defendant failed to follow Plaintiffs instructions and through its reckless and negligent trading activities substantially diminished the value of the accounts.

22. Jeffrey Coo, one of Defendant's New York traders was known to Defendant and its other employees frequently to generate as much in commissions as the value of the various commodity accounts which he managed through "churning." In the case of Plaintiff's accounts, this was accomplished through the device of taking a large number of positions on various commodity futures then liquidating the same almost immediately.

23. In late 1973, Defendant suddenly rescinded the payment schedule being utilized to compensate its employee traders so that a smaller percentage of the total commission would go to the trader. This sudden change created great dissension among said traders together with pressure to trade with greater frequency to generate an equivalent amount of commissions regardless of the consequences to the customers.

24. In early March, 1974, as a result of imprudent and reckless trading activity by Defendant which was solely for the purpose of generating large commissions, Plaintiffs' accounts declined in value from approximately $92,000 to $45,000. At the time of said decline, Plaintiffs were in Colorado, however, Defendant made no attempt to contact Plaintiffs in Colorado although Defendant was given a toll-free number which Plaintiffs could be reached.

25. On March 4, 5 and 6, 1974, in disregard of the safeguards and loss limiting procedures allegedly employed, Defendant continued to make trades in Plaintiffs' accounts in spite of the drastic decline in the value of the accounts and despite the fact that Plaintiffs had no knowledge thereof.

26. Plaintiffs, on March 6, 1974, finally learned of the large losses suffered in their commodity accounts when they were contacted by Lawrence McMann, who did not manage said accounts, but who felt Plaintiffs should be informed of the effect of the commodity trader's activities on their accounts.

27. Plaintiffs expressed extreme chagrin upon receipt of the information concerning the decline in value of their accounts and demanded to know how such large losses could occur in view of the "safeguards" which were represented to be built into Defendant's trading system. Defendant responded that the loss occurred because Defendant could not sell or trade without Plaintiffs' prior approval despite the fact Defendant previously had never sought Plaintiffs' prior approval on any trade made for the accounts.

28. Immediately upon obtaining notice of the large decline in the account and thereafter Plaintiff J.J. Curran contacted Lawrence McMann, who was managing certain non-commodity accounts for Plaintiff and requested that all trading in the commodity accounts be discontinued and Plaintiffs be "cashed out" in order to preserve the remaining value in the accounts. Lawrence McMann promptly related Plaintiffs' requests to George Stover, who was managing Plaintiffs' commodity accounts and who advised McMann that he would not close the accounts because of the large commissions being generated, and further that such action was not in accordance with Defendant's specialized guided account trading program. On each such occasion, Stover and McMann called Plaintiff and convinced him to permit trading to continue on the representations that the situation would improve and that under the "specialized guided account trading program", Plaintiffs were obligated to continue following Defendant's trading suggestions and activities in their accounts.

29. On another occasion as losses continued to be suffered, Plaintiff J.J. Curran contacted Stover directly and demanded that the commodity accounts be "cashed out." Stover declined to follow Plaintiff's instructions and called back with McMann to convince Plaintiff to allow trading to continue by making the representation that any losses would be recouped.

30. Despite repeated requests by Plaintiff that the accounts be cashed out, Defendant was reluctant to do so because of the fact that the commissions derived therefrom constituted a significant percentage of all commissions generated in the office.

31. At the time that the representations set forth hereinabove were made and during the course of the period that Plaintiffs maintained commodity accounts with Defendant, Plaintiffs did not know nor have any reasonable basis to know that the said representations were false, but believed and relied upon said representations as being true.

32. As a result of all of the foregoing representations, Plaintiffs were induced to establish commodities accounts with Defendant, which Plaintiffs continued to maintain until they discovered the false, fraudulent and deceitful nature of the representations as set forth herein and at that time, in April, 1974, Plaintiffs insisted the accounts be cashed out.

COUNT I

33. Defendant breached the agreement between the parties requiring it to observe certain safeguards and stop-loss limits as set forth hereinabove.

34. In addition, Defendant breached the agreement between the parties by failing to follow on several occasions Plaintiffs' instructions that the accounts be cashed out.

35. As a direct and proximate result of said breaches, the value of Plaintiff's accounts were severely reduced, thereby resulting in damage to Plaintiffs in the sum of $85,000.00

WHEREFORE, Plaintiffs pray that this Court enter judgment in their favor and against Defendant in the sum of $85,000.00, together with interest, costs and their reasonable attorneys fees.

COUNT II

36. In managing Plaintiffs' accounts, Defendant, and specifically, without limitation, its employees, Dougherty, Stover, Coo and Owen, were negligent in the following particulars among others, to wit:

a. Defendant failed to employ the technical loss limiting procedures agreed upon between the parties, which such loss limiting procedures would have been employed by an ordinarily prudent commodities executive;

b. Defendant, and especially Jeffrey Coo, instituted and maintained in Plaintiffs' accounts unusually, grossly and imprudently overextended positions in numerous commodities;

c. Defendant failed to employ a scientific and comprehensive investment plan with respect to Plaintiffs' accounts and instead engaged in reckless and haphazard trading with the sole intention of generating large commissions;

d. Defendant failed to exercise supervision over its employees to restrain them from engaging in excessive and reckless trading activities and instead by virtue of its alteration of the trader's compensation schedule and otherwise encouraged the excessive trading as a means of generating large commissions and profits;

e. Defendant failed to consult with Plaintiffs as to the quality of the positions assumed, decisions and events affecting their accounts;

f. Defendant generally failed in other respects to manage and handle the accounts in a skillful, prudent, reasonable and professional manner.

g. Defendant failed and refused to cash out Plaintiffs' accounts when requested to do so.

37. By virtue of the reckless and negligent acts of Defendant and its employees all as set forth hereinabove, Plaintiffs suffered damage in the sum of $175,000.00 in decline in value of the accounts and $44,566.00 in commissions paid to Defendant.

WHEREFORE, Plaintiffs pray that this Court enter judgment in their favor and against Defendant in the sum of $219,566.00, together with interest, costs and their reasonable attorneys fees.

COUNT III

38. By virtue of the relationship of Plaintiffs and Defendant, Defendant assumed and occupied fiduciary position of trust and confidence and thereby owed to Plaintiffs the duties of loyalty, fairness, due care and good faith.

39. Defendant, by virtue of its actions and misrepresentations as set forth hereinabove, breached said duty to Plaintiff's damage in the sum of $175,000.00 in decline in value of the accounts and $44,566.00 in commissions paid to Defendant.

WHEREFORE, Plaintiffs pray that this Court enter judgment in their favor and against Defendant in the sum of $219,566.00, together with interest, costs and their reasonable attorneys fees.

COUNT IV

40. Defendant, through the use of means or instrumentalities of interstate commerce, and the mails, made an offer and sale of an investment contract and/or contracts to Plaintiffs without the filing of a registration statement as required by the Securities Act.

41. Accordingly, said offer and sale of an investment contract and/or contracts was made in violation of Sections 5 and 12(2) of the Securities Act.

42. The consideration paid by Plaintiffs for said investment contract and/or contracts was $194,566.00, of which Plaintiffs have recovered approximately $109,000.00.

WHEREFORE, Plaintiffs pray that this Court enter judgment in their favor and against Defendant in the sum of $85,000.00, together with interest, cost and their reasonable attorneys fees.

COUNT V

43. In connection with the offer and sale of the aforesaid investment contract, and/or contracts, securities and commodity futures involved herein, Defendant, directly and indirectly, by the use of means or instrumentalities of interstate commerce, and the mails, made untrue statements of material facts, and omitted to state material facts to Plaintiffs necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, all as set forth hereinabove.

44. Said misrepresentations, untrue statements of material facts and omissions of material facts operated as a fraud and deceit upon Plaintiffs and were in violation of Rule 10b-5 promulgated under the Exchange Act and Section 15(c)(1) thereof, Section 17(a) of the Securities Act, Section 6 of the Commodity Exchange Act, Section 410(a)(2) of the Michigan Uniform Securities Act and rules and regulations of the National Association of Securities Dealers, the New York Stock Exchange, the Chicago Mercantile Exchange, and common law, and damaged Plaintiffs in the sum of $175,000.00 in decline in the value of the accounts and $44,566.00 in commissions paid to Defendant.

WHEREFORE, Plaintiffs pray that this Court enter judgment in their favor and against Defendant in the sum of $219,566.00, together with interest, costs and their reasonable attorneys fees.

COUNT VI

45. In connection with the offer and sale of the investment contract, securities and commodity futures involved herein, Defendant, directly and indirectly, by the use of means or instrumentalities of interstate commerce, and the mails, employed a device, scheme and artifice, and engaged in acts,

practices and a course of dealing which operated as a fraud upon Plaintiffs all as set forth hereinabove.

46. Said devices, schemes, artifices, acts, practices and course of dealing operated as a fraud and deceit upon Plaintiffs and were in violation of Rule 10b-5 promulgated under the Exchange Act and Section 15(c)(1) thereof, Section 17(a) of the Securities Act, Section 6 of the Commodity Exchange Act, Section 410(a)(2) of the Michigan Uniform Securities Act and rules and regulations of the National Association of Securities Dealers, the New York Stock Exchange, the Chicago Mercantile Exchange, and common law, and damaged Plaintiffs in the sum of $175,000.00 in decline in the value of the accounts and $44,566.00 in commissions paid to Defendant.

WHEREFORE, Plaintiffs pray that this Court enter judgment in their favor and against Defendant in the sum of $219,566.00, together with interest, costs and their reasonable attorneys fees.

COUNT VII

47. Said misrepresentations, omissions and nondisclosures of material facts as set forth hereinabove were made intentionally by Defendant and its employees with knowledge of their falsity, for the purpose of deceiving Plaintiffs and with the intent that Plaintiffs rely thereon.

48. Plaintiffs relied upon such misrepresentations, omissions and nondisclosures to their detriment and have been injured as a direct and proximate consequence thereof in the sum of $175,000.00 in decline in the value of the accounts and $44,566.00 in commissions paid to Defendant.

WHEREFORE, Plaintiffs pray that this Court enter judgment in their favor and against Defendant in the sum of $219,566.00, together with interest, costs and their reasonable attorneys fees.

COUNT VIII

49. Said misrepresentations, omissions and nondisclosures of material facts as set forth hereinabove were made at a time when Defendant knew, or should have known, of their falsity.

50. By failing to make full disclosure of such material facts and by making said misrepresentations, Defendant acted with negligent and/or reckless disregard of its duties to Plaintiff, to Plaintiff's damage in the sum of $175,000.00 in decline in the value of the accounts and $44,566.00 in commissions paid to Defendant.

WHEREFORE, Plaintiffs pray that this Court enter judgment in their favor and against Defendant in the sum of $219,566.00, together with interest, costs and their reasonable attorneys fees.

COUNT IX

51. By virtue of the wilful, wanton, intentional and reckless acts of Defendant as set forth hereinabove, Plaintiffs are entitled to punitive and/or exemplary damages from Defendant in the amount of $500,000.00.

WHEREAS, Plaintiffs pray that this Court enter judgment in their favor and against Defendant in the sum of $500,000.00.

HOOPS & HUFF

By: (s) David J. Huff

and (s) Robert A. Hudson
Attorneys for Plaintiffs
2460 Guardian Building
Detroit, Michigan 48226
964-2150

Dated: April 5, 1976

DEMAND FOR JURY TRIAL

NOW COME Plaintiffs, J.J. CURRAN and JACQUELYN CURRAN, by and through their attorneys, HOOPS & HUFF, and make demand for trial by jury of the within cause.

HOOPS & HUFF

By: (s) David J. Huff

and (s) Robert A. Hudson
Attorneys for Plaintiffs
2460 Guardian Building
Detroit, Michigan 48226
964-2150

Dated: April 5, 1976

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action File No. 670683

J.J. CURRAN and JACQUELYN L. CURRAN, individually and as trustees of the JOHN J. CURRAN LIVING TRUST and JACQUELYN L. CURRAN LIVING TRUST,

Plaintiff

v. SUMMONS

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a Delaware corporation

Defendant

To the above named Defendant: MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

You are hereby summoned and required to serve upon David J. Huff and Robert A. Hudson of the law firm of Hoops & Huff plaintiff's attorney, whose address is 2460 Guardian Building, Detroit, Michigan

an answer to the complaint which is herewith served upon you, within 20 days afater service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

HENRY R. HANSSEN
Clerk of Court.

MARILYN OREM
Deputy Clerk.

Date: April 5, 1976 [Seal of Court]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

J.J. CURRAN and JACQUELYN L. CURRAN, Individually and as Trustees of the John J. Curran Living Trust and Jacquelyn L. Curran Living Trust,
Plaintiffs,

vs.

Civil Action
No. 670 683

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., a Delaware corporation,
Defendants.

DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO DISMISS IN PART AND STAY PROCEEDINGS PENDING ARBITRATION

Defendant, by its attorneys, Butzel, Levin, Winston & Quint, moves as follows:

1. That this action be dismissed pursuant to Rule 12(b)(6) Fed.R.Civ.P., for the reason that the limitation period agreed upon in writing by the parties expired prior to filing of the Complaint, or

2. That, in the alternative, the Court dismiss, pursuant to Rule 12(b)(6) Fed.R.Civ.P., those allegations of the Complaint purporting to state claims under the Securities Act of 1933 and the Securities Exchange Act of 1934, to wit: Counts IV, V and VI of the Complaint, and

3. Stay proceedings of the remaining claims pending arbitration, pursuant to the written agreement of the parties and the Federal Arbitration Act, 9 U.S.C. §3.

BUTZEL, LEVIN, WINSTON & QUINT

(s) DOUGLAS G. GRAHAM (P14252)

(s) RICHARD P. SASLOW (P23865)

Attorneys for Defendant
1990 First National Building
Detroit, Michigan 48226
961-7900

Dated: May 24, 1976

Supreme Court, U. S.
FILED
SEP 11 1980
MICHAEL RODAK, JR., CLERK

No. 80-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

J. J. CURRAN and JACQUELYN L. CURRAN,
Respondents.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Attorney for Respondents
J. J. Curran and Jacquelyn L. Curran

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962-8745 962-8746

QUESTIONS PRESENTED FOR REVIEW

1.

WHETHER A PRE-DISPUTE ARBITRATION AGREEMENT BETWEEN A COMMODITIES CUSTOMER AND HIS BROKER, WHICH IS ADMITTEDLY NOT IN COMPLIANCE WITH 17 C.F.R. SECTION 180.3 AND WOULD ADMITTEDLY BE UNENFORCEABLE IF ENTERED INTO AT THE PRESENT DATE, CAN BE ENFORCED AGAINST RESPONDENTS IN THE INSTANT CASE MERELY BECAUSE THE CONTRACT WAS ENTERED INTO PRIOR TO THE ESTABLISHMENT OF SPECIFIC GUIDELINES FOR SUCH AGREEMENTS?

2.

WHETHER THE COMMODITY EXCHANGE ACT CREATES AN IMPLIED RIGHT OF ACTION FOR FRAUD IN FAVOR OF A CUSTOMER AGAINST HIS BROKER?

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No. 80-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

J. J. CURRAN and JACQUELYN L. CURRAN,
Respondents.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondents, John J. Curran and Jacquelyn L. Curran ("Currans") request that a Writ of Certiorari not be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on May 12, 1980.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is not yet officially reported and is unofficially reported at (Current Binder) Fed. Sec. L. Rep. (CCH) Para. 97,390. This opinion is fully set forth in petitioner's appendix to its petition for a writ of certiorari at pages A-1 — A-38. (All page citations hereinafter shall refer to the petition for a writ of certiorari filed in the instant case, unless otherwise noted.) The opinion of the United States District Court for the Eastern District of Michigan (Southern Division) is not officially reported. This opinion is fully set forth at pages A-39 — A-49.

STATEMENT OF THE CASE

During the year 1973, the Currans (respondents-plaintiffs) opened several accounts with Merrill Lynch, Pierce, Fenner & Smith, Inc. (petitioner-defendant), at least two of which were for the purpose of trading in commodity futures. The accounts were opened in reliance upon numerous representations by petitioner as to petitioner's trading acumen and the profits which would inure to respondents as participants in petitioner's Specialized Guided Account Trading Program.

Certain conditions were placed by petitioner upon respondents' participation in the Program. Most importantly, respondents agreed to participate in the Program for at least eighteen (18) months and to follow all of petitioner's trading "suggestions." Other aspects of the Program, as represented to respondents, were periodic reviews by the local Speculative Sales Department manager and specific stop loss procedures

designed to limit the amount of capital which could be lost by respondents.

After the first Program account was opened by respondents on April 5, 1973 by depositing $100,000 with petitioner, petitioner made all trading decisions and exercised complete control over respondents' accounts with complete reliance by respondents upon petitioner's actions and trading decisions. Initially, respondents realized profits on the trading activity in the accounts and at one point withdrew $101,007.80. Thereafter, the accounts declined drastically in value and respondents suffered substantial losses due to improper and excessive trading activities and the failure to observe the "stop loss" procedures represented to exist as part of the Program. On several occasions, respondent J. J. Curran requested that the accounts be closed and that respondents be "cashed out." On each such occasion, except the final one (at which time respondents' capital had been reduced to approximately $6,000), petitioner refused or talked Mr. Curran out of cashing out on the ground that respondents were required to stay in the Program for eighteen months.

Finally, in April 1974, petitioner relented to respondents' demands that their accounts be closed. At that time, respondents had suffered a decline in the value of their accounts in the sum of approximately $175,000 and had paid commissions of approximately $44,500.

This case was commenced by the filing of a complaint by respondents J. J. Curran and Jacquelyn L. Curran in the United States District Court for the Eastern District of Michigan on April 5, 1976. Respondents alleged in support of the District Court's jurisdiction that the amount in controversy was in excess of $10,000 and that

jurisdiction in the federal courts was proper under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. Section 78(aa) (hereinafter referred to as the "1934 Act"), by Section 22(a) of the Securities Act of 1933, 15 U.S.C. Section 77(v) (hereinafter the "Securities Act"), by Sections 1331, 1332 and 1337 of Title 28 of the United States Code and by pendent jurisdiction. The case was assigned to the Honorable Thomas P. Thornton.

Thereafter, defendant-petitioner moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for dismissal of plaintiffs'-respondents' complaint on the grounds that the limitation period agreed upon in writing by the parties expired prior to the filing of the Complaint. Alternatively, petitioner requested that Counts IV, V and VI of the Complaint be dismissed for failure to state claims under the 1934 Act or the Securities Act. Finally, petitioner moved pursuant to the provisions of the Federal Arbitration Act, 9 U.S.C. Section 3, for a stay of remaining claims pursuant to a written agreement to arbitrate contained in the Customer Account Agreements signed by plaintiffs.

On December 27, 1976, Judge Thornton issued a Memorandum Re Motion To Dismiss and Stay Proceedings. In this opinion, which is reproduced at pages A-39 through 49, the Court concluded that the commodities arrangements between the parties herein did not constitute a "security." Thus, the Court granted petitioner's alternate motion to dismiss "those allegations of the Complaint purporting to state claims under the Securities Act of 1933 and the Securities Act of 1934, to wit: Counts IV, V and VI of the Complaint."

By his memorandum opinion and his order dated February 23, 1977, Judge Thornton ordered that "Counts

IV, V and VI of Plaintiff's Complaint be and the same hereby are dismissed." There were no words of limitation whatsoever in the order, which apparently dismissed Counts IV, V and VI, including claims under the Commodity Exchange Act (hereinafter "CEA"), in their entirety. See page A-50. Thus, one ground for respondents' appeal to the Sixth Circuit was that the District Court erroneously dismissed respondents' claims under the Commodity Exchange Act. (Issue #6, Plaintiffs' Statement of Issues on Appeal. See Appendix to Respondents' Brief at page A-2.) In respondents' brief before the Sixth Circuit, it was argued that "a private cause of action exists for violations of the CEA." (Pg. 28 of Brief For Plaintiffs-Appellants. See Appendix to Respondents' Brief at page A-4.)

In an opinion decided and filed on May 12, 1980, the Sixth Circuit Court of Appeals construed the District Court's order of dismissal as granting only the relief requested by the motion to dismiss, which related only to claims under the Securities Act and the 1934 Act. Thus, the pleadings and allegations purporting to state a claim under the CEA were unimpaired by the District Court's order of dismissal. (Pages A-23 -- A-24, fn. 16). The Sixth Circuit Court of Appeals then proceeded to agree with the position set forth in the respondents' brief therein (which position was not opposed by the petitioner herein) and expressly held that a private remedy *did* exist under the Commodity Exchange Act.

The Sixth Circuit Court of Appeals also held that the pre-dispute arbitration agreement in the instant case did not comply with CFTC Reg. Section 180.3 and therefore was unenforceable. Petitioner herein would be unable to dispute this decision by the Court of Appeals if it were applied to agreements presently entered into,

but petitioner objects because this regulation was retroactively applied to nullify the pre-dispute arbitration agreement in this case.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' RETROACTIVE APPLICATION OF COMMODITY FUTURES TRADING COMMISSION REG. SECTION 180.3 IS NOT IN CONFLICT WITH ANY DECISIONS OF ANY FEDERAL COURTS AND IS NOT AN ISSUE WHICH WARRANTS DETERMINATION BY THIS COURT.

The Court of Appeals correctly held that a 1973 pre-dispute arbitration agreement entered into between respondents and petitioner was void. In urging review by this Court, petitioner contends that this creates a conflict "in principle" with prior United States Supreme Court decisions. (Page 26). Respondents see no conflicts, whether "in principle" or otherwise. The only other Court of Appeals to consider this precise issue has been the Second Circuit. See *Ames* v. *Merrill Lynch, Pierce, Fenner and Smith*, 567 F.2d 1174 (2d Cir. 1977). The *Ames* decision was heavily relied upon in the instant controversy and was followed by the Court of Appeals herein.

Petitioner attempts to portray itself as the victim of a great unfairness in the retroactive nullification of its pre-dispute arbitration agreement. Unfairness would exist, however, only if petitioner's pre-dispute arbitration agreements were permitted to stand. The courts in both *Ames* and the instant controversy recognized this pre-dispute arbitration agreement for

what it really is — a contract of adhesion. Oral testimony before the Commodity Futures Trading Commission by a representative of petitioner herein established that "a customer could not do futures business with the firm if he refused to sign a predispute arbitration agreement." (Page A-22). Both courts also recognized that plaintiffs were not attempting to escape from an arbitration award which had previously been entered. Thus, petitioner was deprived of no vested rights which had accrued. (Pages A-21 — A-22, fn. 15).

Finally, assuming *arguendo* that both *Ames* and the Court of Appeals herein were mistaken in the retroactive application of the CFTC Regulation Section 180.3, this issue is still not one which this Court should exercise its discretion to review. This Court is well aware of the limited circumstances under which a writ of certiorari shall issue. Thus, it has been stated that —

> No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.

Taft, C. J., in Hearings Before the House Committee on the Judiciary, 67th Cong., 2d Sess., Ser. 33, at 2 (1922). Respondents wish to emphasize that any decision on

the retroactive application of a Commodity Futures Trading Commission regulation which became effective on November 29, 1976 — nearly four years ago — has limited, if any, public importance. With regard to pre-dispute arbitration agreements entered into on or after November 29, 1976 the law is perfectly clear. With respect to pre-dispute arbitration agreements entered into before November 29, 1976, the decision in the instant controversy and the *Ames* decision establish the requisite legal principles. Any review of the present decision by this Court would affect few persons besides the litigants in the instant controversy.

CFTC Reg. Section 180.3 was construed properly by the Sixth Circuit Court of Appeals. As noted in the decision of the Court, a contrary result would run contrary to the notion "that customers who had entered into agreements before adoption of the regulation needed and were entitled to the protections of the rule no less than those customers who signed agreements after November 29, 1976." (Page A-23).

II.

THE ISSUE WHETHER THE COMMODITY EXCHANGE ACT SUPPORTS THE IMPLICATION OF A PRIVATE RIGHT OF ACTION HAS BEEN CORRECTLY DETERMINED BY THE COURT OF APPEALS AND THE DECISION BELOW DOES NOT CONFLICT WITH PRIOR OPINIONS OF THIS COURT.

Petitioner maintains that the decision in the instant controversy conflicts "in principle" with prior decisions of this Court, particularly *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) and *Touche*

Ross & Co. v. *Redington*, 442 U.S. 560 (1979). The cases cited by petitioner are not directly controlling, but they merely delineate a methodology to determine whether a private right of action may be implied from a federal statute. The Sixth Circuit Court of Appeals was aware of these decisions (Page A-30) and followed a painstaking analysis of the four factors deemed relevant by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975). (Pages A-29 — A-34).

The instant decision has been cited approvingly and followed by the Court of Appeals for the Second Circuit. In *Leist* v. *Simplot*, Nos. 79-7402, 7464, 7482 (July 8, 1980), the Second Circuit Court of Appeals considered in great detail the possible effects of *Redington, supra*, as well as other recent decisions of this Court, upon the four-pronged *Cort* v. *Ash* analysis. Both *Redington* and *Transamerica* were inapposite to the determination of whether a private remedy would be inferred from the provisions of the CEA, because the statutes construed in those decisions (Section 17(a) of the 1934 Securities Exchange Act and Section 206 of the 1940 Investment Advisers Act, respectively) were both enacted *prior* to the great explosion in judicial recognition of implied rights and the legislative history of both statutes was "entirely silent" on the availability of an implied private remedy. On the other hand, numerous references in the legislative history of the CEA illustrated Congressional acceptance and approval of the implied private remedy which had previously been assumed under the CEA. The Second Circuit Court of Appeals found that "the legislative history and the circumstances of (a statute's) enactment evince a clear intent to preserve a private cause of action." See

Sec. Reg. & L. Rep. No. 563, p. H-14 (July 23, 1980) (excerpts from *Leist* v. *Simplot* opinion).

Moreover, the decision reached by the Court of Appeals in the instant case is imminently fair. If this Court should decide that the CEA provides no implied private remedy, then respondents would be left with *no* federal remedies available to them.

Finally, the decision reached by the Court of Appeals is consistent with the viewpoint expressed by the Commodity Futures Trading Commission. As the Court of Appeals noted (Page A-28):

> The CFTC has interpreted the Act as implicitly authorizing private actions, and asserts that the right must be presumed to have survived the 1974 amendments unless Congress explicitly abolished the private remedy in enacting the amendments. Statements of CFTC Concerning Referral of Private Litigation Under the Doctrine of Primary Jurisdiction. 41 Fed. Reg. 18471 (May 5, 1976). See also *Smith* v. *Groover*, 468 F. Supp. 105 (N.D. Ill. 1979) (amicus brief submitted by CFTC).

III.

THE ISSUE WHETHER THE COMMODITY EXCHANGE ACT SUPPORTS THE IMPLICATION OF A PRIVATE RIGHT OF ACTION HAS BEEN FAIRLY SETTLED BY THE COURTS OF APPEALS FOR THE SECOND AND SIXTH CIRCUITS, AND NO COMPELLING REASON EXISTS FOR A DECISION BY THIS COURT AT THIS TIME.

Petitioner contends that the Court of Appeals' implication of a private right of action for fraud under the CEA raises an important question of federal law

that should be settled by this Court. Respondents disagree with this assertion for the following reasons:

(1) Prior to 1974, petitioner admits a "harmony" among the lower federal courts that a private cause of action existed under the CEA. (Page 13). The opinion of the Court of Appeals in the instant case examines pre-1974 case law in greater detail and reaches a similar conclusion (Page A-24, fn. 18).

(2) After 1974, a number of lower federal courts have concluded that no private right of action can be implied from the CEA. Of the nine cases cited by petitioner (Page 14, fn. 34) as directly opposed to the implication of a private remedy, four of these cases no longer represent good law in their own jurisdictions, being reversed either directly or *sub silentio* by the decisions in the instant case and in *Leist, supra*.

(3) The instant case was decided on May 12, 1980. *Leist, supra*, was decided on July 8, 1980. These are the only decisions rendered since 1974 by any Court of Appeals on this issue. Both cases decided that a private cause of action exists for violations of the CEA. It should be anticipated that subsequent decisions by the federal district courts will follow the currently unanimous view among the Courts of Appeal.

(4) Although petitioner contends that this issue is an important legal issue which should be finally resolved, it is interesting that the Court of Appeals observed that "no issue concerning the continuing validity of the implied right of action was raised in the court below, nor in this appeal." (Page A-24). Nor is this the only case in which this petitioner has failed to question the validity of implied rights of action under

the CEA. See *Ames* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1176 (2d Cir. 1977) ("It is agreed that there is an implied cause of action under the Act (CEA) for a private remedy"). Petitioner, in effect, wishes to raise this issue for the first time via petition for certiorari to this Court. This Court, in order properly to decide this issue, should defer resolution of this issue until it has been effectively briefed and argued in the lower courts, so that the opinions reached by the courts below and the entire record of the case will provide this Court with a greater ability to reach a fair and just decision.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 4, 1980

APPENDIX

DESIGNATION OF PORTIONS OF TRANSCRIPT AND STATEMENT OF ISSUES ON APPEAL

(United States District Court
Eastern District of Michigan
Southern Division)

(J. J. Curran, et al., Plaintiffs, vs. Merrill Lynch, Pierce, Fenner & Smith, Inc., a Delaware corporation, Defendant. Civil No. 6-70683)

NOW COME the Appellants herein and pursuant to Federal Rule of Appellate Procedure 10(b) hereby provide notice to the Appellee that Appellants do not intend to include in the record on appeal any transcript.

Appellants further state that the issues they intend to present on appeal are as follows:

1. Whether Plaintiffs' Complaint states a cause of action under the Securities Act of 1933, 15 U.S.C. § 77(a) et seq. and the Securities Exchange Act of 1934, 15 U.S.C. § 78(a), et seq.

2. Whether plaintiffs purchased an "investment contract" and thus a "security" or "securities" within the meaning of the Securities Act of 1933, and the Securities Exchange Act of 1934, from Defendant.

3. Whether plaintiffs purchased a "security" within the meaning of said acts when they agreed with defendant to participate in a common enterprise.

4. Whether there exists a genuine issue as to any material fact alleged in Counts IV, V and VI of plaintiffs' complaint precluding entry by the District Court of a judgment dismissing said counts.

5. Whether Defendant is entitled to a judgment as a matter of law on Counts IV, V and VI of plaintiffs' complaint.

6. Whether the District Court erroneously dismissed Plaintiffs' claims under the Commodity Exchange Act, as amended, 7 U.S.C. § 1, et seq.

7. Whether the District Court erred in denying Plaintiffs' Motion for Leave to File an Amended and/or Supplemental Complaint.

This designation and statement of issues is made pursuant to Rule 10(b) of the Federal Rules of Appellate Procedure to notify the Clerk of the above Court, the United States Court of Appeals for the Sixth Circuit and Appellee herein, that Appellants do not intend to include the transcript in the record on appeal in this case.

Dated: April 4, 1977

HOOPS & HUDSON

EXCERPTS FROM RESPONDENTS' BRIEF BEFORE THE COURT BELOW

(In the United States Court of Appeals
For the Sixth Circuit)

(J. J. Curran and Jacquelyn L. Curran, Plaintiffs-Appellants vs. Merrill Lynch, Pierce, Fenner & Smith, Inc., Defendant-Appellee. File No. 77-1300)

THE ISSUES PRESENTED

I.

WHETHER A POOLING OF THE FUNDS OF DIFFERENT INVESTORS IS NECESSARY TO ESTABLISH A COMMON ENTERPRISE FOR PURPOSES OF FINDING THE EXISTENCE OF AN INVESTMENT CONTRACT UNDER THE FEDERAL SECURITIES LAWS

II.

WHETHER THE EXISTENCE OF AN AGREEMENT TO PARTICIPATE IN A COMMON ENTERPRISE IS SUFFICIENT TO STATE A CLAIM UNDER THE FEDERAL SECURITIES LAWS

III.

WHETHER THERE WAS A GENUINE DISPUTE AS TO THE MATERIAL FACT OF WHETHER A COMMON ENTERPRISE EXISTED WHICH PRECLUDED DISMISSAL OF PLAINTIFFS' CLAIMS UNDER THE FEDERAL SECURITIES LAWS

IV.

WHETHER THE DISTRICT JUDGE ERRED IN DISMISSING PLAINTIFFS' CLAIMS UNDER THE COMMODITY EXCHANGE ACT

V.

WHETHER THE DISTRICT JUDGE ERRED IN DENYING PLAINTIFFS LEAVE TO FILE THEIR AMENDED AND/OR SUPPLEMENTAL COMPLAINT

(Excerpts From Pages 28-29 Of
Respondents' Brief)

III.

THE DISTRICT JUDGE ERRED IN DISMISSING PLAINTIFFS' CLAIMS UNDER THE COMMODITY EXCHANGE ACT

The Commodity Exchange Act, 7 U.S.C. § 1 et seq. (herein the "CEA") prohibits fraudulent acts in connection with the purchase or sale of regulated commodity futures. It is well established that a private cause of action exists for violations of the CEA. *Deaktor v. L.P. Schreiber & Co.*, 479 F. 2d 529 (7th Cir. 1973); *Goodman v. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967); *Johnson v. Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764 (S.D.N.Y. 1972). Based on that settled right of action, plaintiffs in Counts V and VI of their complaint charged defendant with engaging in conduct which not only violated provisions of the federal securities laws, but were also violative of provisions of the CEA.

In its motion to dismiss, defendant moved the District Court to dismiss "those allegations of the Complaint purporting to state claims under the Securities Act of 1933 and the Securities Exchange Act of 1934, to wit: Counts IV, V and VI of the Complaint."

By his memorandum opinion and his order dated February 23, 1977, Judge Thornton ordered that "Counts IV, V and VI of Plaintiff's Complaint be and the same hereby are dismissed." There were no words of limitation whatsoever in the order and thus the order dismisses Counts IV, V and VI, including claims under the CEA, *in their entirety*.

Plaintiffs are unable to fathom the basis upon which its CEA claims were thus stricken, particularly since

defendant did not even request such relief and there is not a shred of authority upon which that dismissal can rest. Nor can plaintiffs understand the refusal by Judge Thornton to amend his order to conform to the pleadings and to the law. Such dismissal of CEA claims and refusal to amend the Court's order are clearly erroneous. They should be reversed by this Court.

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No. 80-203

In the Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
PETITIONER
v.
J. J. CURRAN AND JACQUELYN L. CURRAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION AS AMICUS CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION AS AMICUS CURIAE

QUESTION PRESENTED

Whether a private right of action continues to be available to remedy violations of the antifraud provisions of Section 4b of the Commodity Exchange Act, as amended, 7 U.S.C. 6b.

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INTEREST OF THE COMMODITY FUTURES TRADING COMMISSION

The Commodity Futures Trading Commission is an independent federal regulatory agency created in 1974 to administer the Commodity Exchange Act of 1936, as amended, 7 U.S.C. (& Supp. III) 1 *et seq.* ("the Act"). Under the Act, the Commission has exclusive regulatory authority over the trading of commodity futures contracts in the United States. See 7 U.S.C. (Supp. III) 2. The Commission's statutory duties include ensuring that commodity futures contracts are traded only on designated contract markets, registering various categories of commodity professionals, and enforcing the antifraud and other prohibitions of the Act through administrative and injunctive proceedings.[1]

Implicit in its statutory mandate is the Commission's obligation to ensure that the Act is enforced and interpreted consistently with Congress' remedial purposes. The Commission thus has a strong interest in seeing that all the legal remedies provided by the Act are made available to a commodity customer. It has been the Commission's consistent position that a customer who alleges fraud in connection with a commodity futures transaction may seek relief either through: (1) contract market arbitration proceedings (7 U.S.C. (Supp. III) 7a(11)); (2) Commission reparation proceedings (7 U.S.C. (Supp. III) 18); or (3) the courts, pursuant to an implied private right of action under the Act.

STATEMENT

In 1973, respondents opened accounts with petitioner for the purpose of trading commodity futures contracts (Pet.

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[1]See 7 U.S.C. 6, 6b, (Supp. III) 6d, (& Supp. III) 6k, (Supp. III) 6m, 7, (Supp. III) 8, 9, 13a-1 and (& Supp. III) 18.

App. A-4).[2] By April, 1974, respondents had sustained substantial losses in these accounts and petitioner acquiesced in respondents' demand that the accounts be closed (*id.* at A-5). It is alleged that at the conclusion of this period of trading, respondents' account had lost approximately $175,000, while petitioner had been paid $44,500 in commissions (*ibid.*).

On April 5, 1976, respondents brought this action in the United States District Court for the Eastern District of Michigan alleging, *inter alia*, that petitioner had engaged in fraudulent practices in violation of Section 4b of the Act, 7 U.S.C. 6b (Pet. 3; Pet. App. A-43). The district court ordered the Section 4b claim stayed pending arbitration, as provided in the customer agreement form signed by respondents (Pet. App. A-50). It also granted petitioner's motion to dismiss those of respondents' claims that were based upon violations of the federal securities laws (*ibid.*).

The court of appeals reversed that portion of the district court's order that had stayed respondents' Section 4b claim (Pet. App. A-50) and proceeded to address the question whether a private right of action exists under Section 4b of the Act (*id.* at A-23 to A-24). After applying the analysis established by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975), for considering implied private rights of action (*id.* at A-30), the court of appeals focused on Congress' intent in enacting the 1974 amendments to the Act and concluded that it was "not persuaded that Congress intended to extinguish the pre-existing private right of action which had been generally acknowledged to exist under the Act" prior to 1974 (*id.*

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[2]Petitioner was at that time, and continues to be, registered as a futures commission merchant as required by Section 4d of the Act, 7 U.S.C. (Supp. III) 6d.

at A-36). Accordingly, the court of appeals held that respondents were entitled to maintain a private right of action under Section 4b (*id.* at A-37). Judge Phillips dissented (*id.* at A-37 to A-38).

DISCUSSION

1. When the petition for a writ of certiorari in this case was filed, the Commission did not believe that the question presented was one that warranted resolution by this Court. In the Commission's view, the court of appeals' decision was correct, and no conflict existed among the courts of appeals on this issue. The Second Circuit, the only other court of appeals to decide the question, had also concluded that private rights of action under the Act had not been affected by the 1974 amendments and were available under Section 4b as well as other provisions of the Act. *Leist* v. *Simplot*, Nos. 79-7402, 79-7464 and 79-7482 (2d Cir. July 8, 1980), petitions for cert. pending, Nos. 80-757, 80-895, 80-936.[3]

On December 16, 1980, however, the United States Court of Appeals for the Fifth Circuit held that, in light of the comprehensive nature of the 1974 amendments, a private right of action is no longer available to remedy violations of Section 4b of the Act. *Rivers and Lamb* v. *Rosenthal & Co.*, No. 79-1313.[4] This decision has created a conflict among the courts of appeals on the question of the existence of an

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[3]This opinion is unofficially reported at 2 Comm. Fut. L. Rep. (CCH) para. 21,051. In addition, two other courts of appeals had noted that the 1974 amendments did not appear to affect the continued viability of private rights of action under the Act. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Goldman*, 593 F. 2d 129, 133 n.7 (8th Cir.), cert. denied, 444 U.S. 838 (1979); *Rosenthal & Co.* v. *CFTC*, 614 F. 2d 1121, 1123 (7th Cir. 1980).

[4]A copy of this decision has been filed with the Court as a joint appendix to supplemental briefs in support of the petitions in Nos. 80-757, 80-895, and 80-936 (hereinafter "J.A."). The Fifth Circuit also

implied private right of action under Section 4b.[5] Because of this conflict, commodity customers may now be unwilling to risk bringing a private right of action under Section 4b. As a result, customers who would otherwise file court actions alleging fraud against their commodity professionals may instead attempt to bring reparation claims before the Commission to remedy violations of Section 4b. These claims would exacerbate wha Congress has already identified as a substantial backlog in Commission reparation proceedings and would thereby undermine Congress' desire that reparations "bring about inexpensive and expeditious adjudication of customer claims." S. Rep. No. 95-850, 95th Cong., 2d Sess. 11 (1978). See also *id.* at 16. Because the administration of the Act will be furthered by a definitive resolution of this conflict as soon as possible,[6] the Commission now urges this Court to grant the instant petition for a writ of certiorari.[7]

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refused to recognize a private right of action under Section 4k of the Act, 7 U.S.C. (& Supp. III) 6k, and Commission Rules 32.3 and 32.9, 17 C.F.R. 32.3 and 32.9. J.A. 2a-4a.

[5]A conflict also exists among district courts that have addressed this question. Compare *Smith* v. *Groover*, 468 F. Supp. 105 (N.D. Ill. 1979), and *Navigator Group Funds* v. *Shearson Hayden Stone, Inc.*, 487 F. Supp. 416 (S.D.N.Y. 1980) (private right of action inferred under the Act), with *Fischer* v. *Rosenthal & Co.*, 481 F. Supp. 53 (N.D. Tex. 1979), appeal pending, No. 80-1056 (5th Cir.), and *Mullis* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 492 F. Supp. 1345 (D. Nev. 1980) (no private right of action). See also cases cited in *Leist* v. *Simplot, supra*, slip op. 4059-4060 n.19.

[6]The issue is currently pending before two other courts of appeals. *Alken* v. *Lerner and E. F. Hutton & Co.*, No. 80-1918 (3d Cir.); *Kotz and Kolar, Inc.* v. *Bache Halsey Stuart, Inc.*, No. 79-3442 (9th Cir.).

[7]Because no conflict exists among the courts of appeals, the Commission is not asking this Court to consider the second issue framed by petitioners, concerning the retroactive application of Commission Rule 180.3, 17 C.F.R. 180.3, which relates to arbitration of customer grievances (Pet. 26). Similarly, no direct conflict exists with respect to the holding of the Second Circuit in *Leist* v. *Simplot, supra*, finding an

2. Although the Commission urges the Court to grant this petition, the Commission continues to believe that the decision below is correct. Since its enactment in 1936, Section 4b of the Act has been the principal antifraud protection afforded to commodity customers. A private right of action serves as a "necessary supplement" to Commission enforcement action in providing the protections embodied in Section 4b. Cf. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964). Accordingly, prior to 1974, there was an "unbroken line of decisions upholding a private right of action" under the Act. *Leist* v. *Simplot*, *supra*, slip op. 4054. Congress did not eliminate this right of action. As the Second Circuit concluded in *Leist*, "the legislative history amply demonstrates the 1974 Congress' awareness of the uniform judicial recognition of private rights of action under the Commodity Exchange Act and a desire to preserve them." Slip op. 4072. In light of this congressional intent, it is clear that a private right of action continues to exist under Section 4b. See, *e.g.*, *Cannon* v. *University of Chicago*, 441 U.S. 677, 698-699, 702-703, 710-711 (1979).

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implied private right of action under Sections 4a, 5(d), 5a(8), and 9(b) of the Act, 7 U.S.C. 6a, 7(d), 7a(8), and (Supp. III) 13(b), although the breadth of the language used in *Rivers* suggests that the Fifth Circuit would hold that no private right of action should be implied under those provisions. See J.A. 27a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE COMMODITY FUTURES TRADING COMMISSION AS AMICUS CURIAE

On January 23, 1981, the Commission filed a brief amicus curiae urging the Court to grant this petition in order to resolve a conflict in the circuits concerning the availability of a private right of action to remedy violations of Section 4b of the Commodity Exchange Act, 7 U.S.C. 6b. On February 23, 1981, the Court granted and consolidated three petitions for a writ of certiorari (Nos. 80-757, 80-895 and 80-936) filed from the Second Circuit's decision in *Leist* v. *Simplot*, 638 F. 2d 283 (1980). In *Leist*, the court of appeals held that a private action for damages may be brought to remedy violations of Sections 4a, 4b, 5(d), 5a(8) and 9(b) of the Act, 7 U.S.C. 6a, 6b, 7(d), 7a(8) and (Supp. III) 13(b). The Commission agrees with this holding and

intends to file a brief in support of this position. The Commission is filing this supplemental memorandum, however, in order to bring to the Court's attention an important factual aspect of *Leist* that may warrant granting the instant petition as well.

Section 4b of the Act makes it unlawful "for any person, in or in connection with any order to make, or the making of, any [commodity futures] contract * * * for or on behalf of any other person * * * (A) to cheat or defraud * * * such other person." 7 U.S.C. 6b(A). Although the precise scope of the coverage of this section has not been settled by the courts (compare *Leist* v. *Simplot, supra*, 638 F. 2d at 322-323, with *id.* at 331-332 (Mansfield, J., dissenting)), it is the Commission's view that Section 4b is violated only if the party committing the alleged fraud was acting "for or on behalf of" the defrauded party. Thus, a principal-agent or fiduciary relationship, such as between a customer and his broker, is a necessary element of a violation of Section 4b. See *Gordon* v. *Shearson Hayden Stone Inc.*, 2 Comm. Fut. L. Rep. (CCH) para. 21,016, at 23,976, 23,980-23,981 (CFTC Apr. 10, 1980), appeal pending, No. 80-7212 (9th Cir.).

The primary allegation of a violation of Section 4b in *Leist* is that the defendant futures commission merchants conspired with their customers to accumulate substantial "short" positions and thereby to depress and manipulate prices on the potato futures market. This conduct, it is alleged, resulted in financial injury to the plaintiff traders who were on the opposite, or "long," side of the market. See *Leist* v. *Simplot, supra*, 638 F. 2d at 289-293. Thus, the alleged violation of Section 4b is the defrauding of the plaintiff "long" traders by the actions of the defendant "short" traders. This allegation does not involve a breach of fiduciary duty; the defendants were not acting "for or on

behalf of" the plaintiffs. See 638 F. 2d at 331-332 (Mansfield, J., dissenting). Hence, in the Commission's view, the complaint in *Leist* does not allege a violation of Section 4b of the Act.[1]

The petition in the instant case, in contrast to *Leist*, does present the question whether a private action may be brought by a commodity futures customer who is defrauded by his broker in violation of Section 4b. Both the majority (638 F. 2d at 286 n.1) and the dissent (638 F. 2d at 342) in *Leist* recognized this important difference between the two cases. Moreover, as the court noted in *Leist* (638 F. 2d at 300), most of the private suits alleging violations of Section 4b have involved claims of fraud committed by brokers upon their customers. Indeed, the decisions of the Fifth Circuit that are in conflict with this case and *Leist* on the availability of a private right of action under Section 4b both involved suits brought by customers against their brokers. *Fischer* v. *Rosenthal & Co.*, No. 80-1056 (5th Cir. Feb. 20, 1981); *Rivers* v. *Rosenthal & Co.*, 634 F. 2d 774 (5th Cir. 1980), petition for cert. pending, No. 80-1542 (filed Mar. 10, 1981).

Thus, the most significant and recurring question in this area is the availability to a defrauded customer of a private right of action against his broker under Section 4b.[2] But this question will not necessarily be resolved by the Court's decision in *Leist* because of the unusual context in which the

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[1]The complaint, however, does appear to state a violation of Section 9(b) of the Act, 7 U.S.C. (Supp. III) 13(b), the anti-manipulation provision.

[2]The Fifth Circuit and the Ninth Circuit have deferred consideration of pending cases raising this question while awaiting the Court's decision in *Leist*. *Fischer* v. *Rosenthal & Co.*, *supra* (motion for extension of time to file petition for rehearing and stay of issuance of mandate granted Mar. 23, 1981); *Kotz & Kolar, Inc.* v. *Bache Halsey Stuart, Inc.*, No. 79-3442 (9th Cir., argued Oct. 14, 1980) (submission ordered withdrawn pending this Court's decision in *Leist* Mar. 19, 1981).

Section 4b question arises in that case.[3] Accordingly, the Court may wish to grant the instant petition, limited to Question 1, in order to consider the availability of a private right of action under Section 4b in a case involving an allegation of fraud by a broker against his customer.

Respectfully submitted.

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APRIL 1981

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[3]As this Court has recognized, the availability of an implied private right of action may depend upon the identity of the plaintiff. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730-732 (1975). One of the factors relevant to the inquiry is whether the plaintiff is a member of the class for whose especial benefit the statute was enacted. *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). Thus, in light of the focus of Section 4b on protecting against frauds committed by persons acting "for or on behalf of" other persons, a ruling that the traders in *Leist* may not maintain a private action under Section 4b would not necessarily imply that customers defrauded by their brokers may not bring such an action. Along these lines, Judge Mansfield's dissenting opinion in *Leist* indicates that he did not consider his view necessarily to be inconsistent with the Sixth Circuit's holding in this case. 638 F. 2d at 342.

No. 80-203

Supreme Court, U. S.
FILED
SEP 8 1980
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

J.J. CURRAN and JACQUELYN L. CURRAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* WITH RESPECT TO PETITION FOR A WRIT OF CERTIORARI

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September 5, 1980

No. 80-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Petitioner,

v.

J.J. CURRAN and JACQUELYN L. CURRAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* WITH RESPECT TO PETITION FOR A WRIT OF CERTIORARI

The New York Mercantile Exchange ("NYME") submits this brief as *amicus curiae* and urges this Court to defer consideration of the petition for a writ of certiorari in this action for the reasons stated herein.*

The principal question presented for review by the petition in this action is whether a private cause of action may be implied under § 4b of the Commodity Exchange Act, as amended, 7 U.S.C. § 6b, in favor of a customer against his broker. In the decision below, the Court of Appeals for the

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* Counsel for petitioner and respondents have consented to the filing of this brief. Counsel for petitioner has authorized us to advise the Court that they would acquiesce to proceeding in the fashion suggested here. Counsel for respondents has requested us to advise the Court that he does not consent to deferring consideration of the petition.

Sixth Circuit ruled 2 to 1 that such a cause of action was to be implied. This ruling was the first by any Court of Appeals on whether a private cause of action was to be implied under any section of the Commodity Exchange Act since the Act was amended in 1974.

NYME is one of the appellees in a series of appeals recently decided by the Court of Appeals for the Second Circuit, *Leist* v. *Simplot*, 79-7402, 79-7464, 79-7482. The *Leist* cases were brought by traders in the commodity markets against other traders and their brokers and the NYME, a commodity exchange. A private cause of action was asserted under §§ 4b, 9(b), 5(d) and 5a(8) of the Commodity Exchange Act, 7 U.S.C. §§ 6b, 13(b), 7(d) and 7a(8).

On July 8, 1980, a panel of the Court of Appeals, also in a 2 to 1 decision, reversed the District Court's decision in these cases which held that there was no private cause of action against the brokers or the NYME,* and ruled that a private cause of action was to be implied. The majority's decision was set forth in an 88-page opinion by Judge Friendly. Judge Mansfield wrote a 76-page opinion in dissent.**

NYME and the three broker appellees have filed petitions for rehearing with suggestion for rehearing *in banc*.*** The Court of Appeals has not yet ruled on these petitions.

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* *National Super Spuds* v. *New York Mercantile Exchange*, 470 F. Supp. 1256 (S.D.N.Y. 1979).

** The decision is reported unofficially at CCH Com. Fut. L. Rep. ¶ 21,051.

*** Copies of the petitions for rehearing are included in the Appendix hereto. The petitions briefly set forth the appellees' contentions as to why the majority in *Leist* is in error and reconsideration is warranted. Many of these contentions are equally applicable to the *Curran* decision.

It is anticipated that regardless of the ultimate resolution of the petitions for rehearing, petitions for certiorari will be filed by one side or the other.

The issue of whether a private cause of action is to be implied under various provisions of the Commodity Exchange Act, as amended, is one of extreme importance, which has not been decided by this Court. *Curran* and *Leist* are the only Court of Appeals decisions to consider this issue. The district courts have been divided on the issue. *Curran* arises in the context of only one section of the Act, and the Court dealt with the private cause of action issue *sua sponte* and only briefly as one of several issues before it. The private cause of action issue had not been addressed by the District Court or briefed or argued by the parties before the Court of Appeals. *Leist*, on the other hand, deals exclusively with the issue of implied private causes of action under the Commodity Exchange Act. It addresses several sections of the Act, including the one considered in *Curran*, and the opinions, which total 164 pages, give exhaustive consideration to the issue. With respect to the § 4b claims, *Leist* provides an added dimension because it involves a claim by customers against brokers other than their own, whereas the claims in *Curran* relate to the customers' own broker.

Leist and *Curran* together afford the opportunity for review of the implied private cause of action issue under several key sections of the Commodity Exchange Act. We respectfully suggest that, in order to effect a comprehensive presentation of this important issue and to eliminate the need for duplicate consideration of closely related petitions, the Court defer consideration of the petition for certiorari

in *Curran* until the petitions for rehearing in *Leist* are resolved and petitions for certiorari in *Leist* are filed.

Dated: September 5, 1980

Respectfully submitted,

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APPENDIX

APPENDIX A

Petition of New York Mercantile Exchange for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 79-7402, 79-7464 and 79-7482 (CONSOLIDATED)

No. 79-7402

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—against—

JOHN RICHARD SIMPLOT, et al.,

Defendants,

and

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees.

No. 79-7464

INCOMCO,

Plaintiff-Appellant,

—against—

WAYNE COUNTY PRODUCE CO. and HAROLD COLLINS,

Defendants,

and

NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

Appendix A

No. 79-7482

NATIONAL SUPER SPUDS, INC., et al.,

Plaintiffs-Appellants,

—against—

NEW YORK MERCANTILE EXCHANGE, et al.,

Defendants,

and

HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Petition For Rehearing With Suggestion For Rehearing *In Banc*

The decision of the panel rendered on July 8, 1980 addresses an extremely important issue—whether or not a private right of action may be implied on behalf of speculators in commodities under §§ 5(d), 5a(8) and 9(b) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 7(d), 7a(8) and 13(b), against a contract market and its officials.*

Judge Friendly, writing for the majority, in which he was joined by Judge Kearse, concluded in an 88 page opinion that a private right of action does exist under the

* The decision also considers private rights of action against futures commission merchants (brokers) under §§ 4b and 9(b) of the Act, 7 U.S.C. §§ 6b and 13(b).

Act. Judge Mansfield, in a 76 page dissent, limiting his consideration to the provisions of the Act at issue in this case, concluded that a private right of action does not exist. As the majority recognized (4021),* "this important issue has divided the district courts, including those within our circuit." **

The creation of a "significant and potentially devastatig remedy of a private action for damages, under which liability could amount to hundreds of millions of dollars" (Dissent at 4117) is a most serious step. The length of the opinions here and the dichotomy of analysis by the eminent jurists who authored the opinions, as well as the divergent views of other courts, illustrate the difficulty of the issue. In light of the Supreme Court's clearly expressed concern that implied private remedies be limited to those provisions which Congress intended to be enforced by private actions and the importance of the issues here to the commodity industry and the public generally, we submit that rehearing by the full Court is warranted.***

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* Citations are to the slip opinion.

** As recently as July 3, 1980, the Southern District of New York held in a case involving a claim by a customer against his broker under § 4b of the Act that there was no private right of action. *Gonzalez* v. *Paine Webber Jackson & Curtis, Inc.*, 79 Civ. 5724 (HFW). In so doing, the Court declined to follow the recent decision of a divided panel of the Sixth Circuit in *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* (6th Cir. May 12, 1980), *reprinted in* BNA Sec. Reg. & L. Rep. No. 554 at G-1 (May 21, 1980)), which *sua sponte* upheld a private right of action against a broker under § 4b. It is noted that the *Curran* case dealt with events occurring before the Act was amended in 1974. Until the decision of this panel, no Court of Appeals had ruled on the issue of implied rights of action against contract markets under the Act, as amended; as noted below, only one Court of Appeals had considered the issue before the Act was amended in 1974.

*** The commodity futures trading industry has undergone extraordinary growth in recent years. While the Chicago markets, which traditionally accounted for the bulk of trading (*see* Majority

Appendix A

Few issues in recent years have captured as much of the attention of both the Supreme Court and the lower federal courts as judicial implication of a private right of action under federal statutes as to which Congress has not seen fit to create an express right. Since *National R.R. Passenger Corp.* v. *National Assn. of R.R. Passengers*, 414 U.S. 453 (1974), decided ten months before enactment of the 1974 amendments to the Act, the Supreme Court has considered implied private remedies no less than eleven times, and except in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) (*"Cannon"*), which presented "the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied remedy are present" (441 U.S. at 717) (emphasis in original), has in each case refused to imply or narrowed an implied private cause of action.*

In these decisions, the Supreme Court has laid down clear —and stringent—standards for the implication of private rights of action. We submit that the majority's opinion fails to meet these standards.**

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at 4056), still play an important role, the New York markets are becoming a more and more significant factor. It follows that the courts of this Circuit have with increasing frequency become the forum for commodities litigation. As in the securities field, the decisions of this Court will be relied upon for guidance.

* *Kissinger* v. *Reporters Committee for Freedom of the Press*, 100 S.Ct. 960 (1980); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) (*"Lewis"*); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979) (*"Redington"*); *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979); *Cannon; Sante Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976); *Cort* v. *Ash*, 422 U.S. 66 (1975); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975).

** For purposes of the instant petition for rehearing, we discuss herein two basic areas, statutory analysis and the standards of

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1. While making reference to various statutory provisions at issue, it is clear that the majority has implied a private remedy "under the Commodity Exchange Act" (4072) on the basis of its analysis of the Act taken as a whole and of decisions concerning sections not relevant here, rather than of the specific sections of the Act at issue. Indeed, the majority fails entirely to consider the language of the specific sections. As the dissent points out (4114), under the Supreme Court's guidelines, private rights of action can only be implied on a section by section basis in light of the statutory language. *See Lewis*, 444 U.S. at 19-20; *Redington*, 442 U.S. at 571-72.

2. The majority suggests that the issue here is not whether Congress intended to create a private right of action, but whether it intended to deny one, which, the majority finds, had been previously implied by the courts (4061). The majority furthermore places the burden on the defendants to demonstrate Congress' intent to deny an implied right (4062). We believe that the majority's underlying premise with respect to prior uniform recognition by the courts of implied rights is in error, particularly with respect to the sections at issue here. (*See* dissent at 4146 *et seq.*) But more importantly, we submit that the standard adopted by the majority of requiring defendants to demonstrate that Congress affirmatively intended to repeal judicially created implied rights is not the proper one. To the contrary, as pointed out by Judge Mansfield in

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legislative intent, as to which we believe the majority has misapprehended the Supreme Court's guidelines. Other aspects of the majority's decision also merit reconsideration. For example, as discussed at length in the dissent (4108, 4131-4141, 4145), the statutory provisions at issue cannot be shown to be for the especial benefit of speculators.

dissent (4111), the standard required by the Supreme Court is an affirmative showing by plaintiffs of Congressional intent to favor an implied right, a showing wholly lacking here. *See Lewis*, 444 U.S. at 15-16; *Redington*, 442 U.S. at 568; *Cannon*, 441 U.S. at 688.

1. *Statutory Analysis*

With respect to the New York Mercantile Exchange (the "Exchange") and its officials, the relevant statutory provisions are §§ 5(d), 5a(8) and 9(b).* Analysis must begin "with the language of the statute itself." (*Redington*, 442 U.S. at 568) "[A]bsent a clearly expressed legislative intention to the contrary," the plain language of a statute "must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 100 S.Ct. 2051, 2056 (1980) (*see* Dissent at 4117).

Section 5(d), enacted in 1922, is a licensing provision. It is directed not at exchanges but at the Commodity Futures Trading Commission (the "Commission"), as the successor to the Department of Agriculture, which is authorized to designate an exchange as a contract market when it complies with certain conditions. Section 5a(8), enacted in 1968, provides that exchanges "shall" enforce their rules. Like the statute at issue in *Redington* (442 U.S. at 569), sections 5(d) and 5a(8) create no rights in favor of anyone. "In those circumstances it was evident to the Court that no private remedy was available." (*Lewis*, 444 U.S. at 24).

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* Although § 9(b) is discussed in the opinion, and we accordingly consider it herein, it is not clear that any claim is being made against the Exchange or its officials under § 9(b). As demonstrated by the majority's summary of the complaints in the various actions (Majority at 4029-39), none of the plaintiffs has alleged manipulation on the part of the Exchange or its officials.

Section 9(b), enacted in 1922, is a criminal provision, and makes it a felony to manipulate or attempt to manipulate the price of a commodity. Like the statute in *Lewis*, section 9(b) "simply proscribes certain conduct, and does not in terms create or alter any civil liabilities." (*Lewis*, 444 U.S. at 19)

The majority ignores the language of the statutory provisions on which plaintiffs predicate their causes of action against the Exchange. But the language of these provisions is clear. They do not create private rights or identify a beneficiary class, or suggest any intent on the part of Congress to provide a remedy to private parties.

2. *Legislative Intent*

Rules of construction may yield to "persuasive evidence of a contrary legislative intent" (*Lewis*, 444 U.S. at 20). Here, however, the legislative history of the Act, in 1922 when sections 5(d) and 9(b) were enacted,* in 1968 when section 5a(8) was enacted,* and in 1974 when the Act was "completely overhauled" (Majority at 4058 n.17) does not contain one word approving a private right of action. (Dissent at 4108-09)

What the legislative history does show is that in the 1922 hearings, reports and debates, there is *no* mention in any context of a private cause of action for damages.

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* In *Redington*, the Supreme Court pointed out that the determinative legislative intent is that of Congress at the time of enactment of the statute (442 U.S. at 575 n.16). *See also Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 n.11 (1979); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979). The majority wholly ignores the legislative history of sections 5(d), 5a(8) and 9(b). This gives rise to an anomalous situation, as the 1974 legislative history, on which the majority relies, contains no discussion or consideration of these provisions. The legislative history in 1922 and 1968, at the time of the enactment of these provisions, contains absolutely no mention of an implied private right of action.

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In 1968, a bill was introduced specifically providing a private cause of action for damages against commodity exchanges.* It was rejected. (See Dissent at 4145-46 and n.11)

In 1974, Congress expressly created a private civil remedy for damages, the reparations procedure (7 U.S.C. § 18). The reparations procedure is a streamlined administrative proceeding, available to "all persons", including plaintiffs in these actions. It was intended to and does provide victims of manipulation or fraud with full damage recovery. Exchanges were excluded from liability under the reparations procedure, but were subject to extensive regulation by the Commission and a panoply of judicial and administrative sanctions. *See* §§ 5b, 6(a), 6b, 6c, 8a(7), 8a(9), 8c, 7 U.S.C. §§ 7b, 8, 13a, 13a-1, 12a(7), 12a(9), 12c. (*See* Dissent at 4120-21, 4145)

While enacting the reparations procedure and providing for plenary regulation of and sanctions against exchanges, Congress rejected two proposed private causes of action for treble damages, and one proposed provision for actual damages for non-wilful and treble damages for wilful violations.** (*See* Dissent at 4158-59) As in *Redington*, when Congress wished to provide a private damage remedy for violations of the Act, "it knew how to do so and did so expressly." (442 U.S. at 572) In *Redington* the court was "extremely reluctant" to imply a cause of action "significantly broader than the remedy that Congress chose to provide." (442 U.S. at 574) Where Congress had before it and failed to enact, in 1968 and 1974, provision for the

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* H.R. 9178, 90th Cong., 1st Sess. § 32 (1967).

** H.R 11195, 93d Cong., 1st Sess. § 17(3) (1973) and S. 2578, 93d Cong., 1st Sess. § 20(3) (1973); S. 2837, 93d Cong., 1st Sess. § 505 (1973).

express private remedy which the Court has been asked to imply, inference of a private cause of action is precisely the sort of "judicial legislation" which the Court cautioned against in *Redington.**

Against this, the majority points to ten lower court cases, decided between 1967 and 1974, "upholding a private right of action under the pre-1974 Act" (Majority at 4054-55). The majority then says that "Congress was aware of the uniform judicial recognition of private rights of action under the Commodity Exchange Act," and that "[n]o amount of labored parsing can obscure the self-evident truth that Congress knew the courts were implying private rights of action and did nothing to alter this." (Majority at 4072, 4075)

Because the majority does not focus on the particular substantive provisions under which plaintiffs are seeking to bring their actions against the Exchange and its officials, it considerably overstates the "uniform judicial recognition" of private rights of action.

No pre-1974 case implied a private cause of action for damages on behalf of anyone under sections 5(d) or 5a(8).

Only two pre-1974 cases implied a private cause of action for damages under § 9(b). One was decided only four months before the 1974 amendments were enacted and held that a broker-dealer, not a customer or trader or an off-market dealer (as is one of the plaintiffs here),** could

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* As we pointed out in our brief to the panel (at pp. 22-23), such "judicial legislation" would raise constitutional questions. (*See Redington*, 442 U.S. at 2490-91; *Cannon*, 441 U.S. at 731 (Powell, J., *dissenting*))

** As noted above (page 4n), we do not agree with the majority's conclusion that the provisions at issue are for the "especial" benefit of speculators. While we do not endeavor to discuss the point

bring an action against an exchange. *Seligson* v. *New York Produce Exchange*, 378 F.Supp. 1076 (S.D.N.Y. 1974). The only case implying a private cause of action for damages in favor of a trader against an exchange was decided one year before enactment of the 1974 amendments. *Deaktor* v. *L.D. Schreiber & Co.*, 179 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973).*

The other pre-1974 cases implying a private cause of action for damages were decided under § 4b of the Act, the antifraud provision, and were brought by customers against their broker-dealers, and not by speculators

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herein, we do feel constrained to point out that the majority's opinion is so sweeping as to extend even beyond speculators. The majority recognizes that the claim of Incomco in 79-7464 was that it planned to sell cash potatoes to futures traders. (Majority 4034) Its claim in that action is not as a futures trader itself. Yet, while finding that the Act is for the "especial" benefit of "futures traders" (Majority 4070), the majority holds that it was for the "especial" benefit of all plaintiffs, including Incomco.

* The majority views the Supreme Court's reversal in *Deaktor* as providing support for implication of a private remedy under the Act. (Majority at 4057) In fact, *Deaktor* expressly declined to reach this issue. (414 U.S. at 115) As Justice Powell stated recently:

> "'[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.' *Hagans* v. *Lavine*, 415 U.S. at 533, n.5; see *Monell* v. *Dept. of Social Services of the City of New York*, *supra*, 436 U.S. at 663. *United States* v. *More*, 3 Cranch 159, 172 (1805). This rule applies with even greater force to questions involving the availability of a cause of action, because the question whether a cause of action exists—unlike the existence of federal jurisdiction—may be assumed without being decided. *Burks* v. *Lasker*, 441 U.S. 471, 476, and n.5 (1979)." *Maine* v. *Thiboutot*, 48 U.S.L.W. 4859, 4867 (June 25, 1980) (Powell, J., *dissenting*).

against an exchange with which they had no relationship.* (*See* Dissent at 4152).

Before 1974, then, a private cause of action for damages, on behalf of speculators like plaintiffs, against an exchange was not "uniformly recognized", but rather had been upheld by only one court in one case decided one year before enactment of the 1974 amendments." ** And neither *Deaktor* nor any other case was discussed by or cited to Congress as implying a private remedy. (Dissent at 4110)***

Moreover, the majority overstates Congressional awareness in 1974 of judicially implied private remedies. In thousands of pages of reports, debates, and testimony, there are only scattered references to a private cause of action, and they are in no way approving or definitive.†

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* The Supreme Court has made clear, in the securities context, that even when an implied private remedy is available, it is not available to all plaintiffs in all situations. *See, e.g., Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 463 (1977); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975).

** It is further noted that *Deaktor* relied on the statutory tort concept developed in *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33 (1916), which the Supreme Court found "entirely misplaced" in *Redington*. (442 U.S. at 568) Nevertheless, the majority here continues to place emphasis on *Rigsby* and its progeny (4051, 4052, 4063, 4101). "[S]ince it is abundently clear that the few pre-1974 decisions were erroneous, being based on the theory of tort rather than Congressional intent, it is unreasonable to suppose that Congress, absent a Supreme Court ruling, intended to compound the error by tacitly giving effect to them." (Dissent at 4182)

*** See *Aaron* v. *SEC*, 48 U.S.L.W. 4609, 4615 n.18 (June 1, 1980), where the Supreme Court noted that in the absence of any indication that Congress was "even aware of" a court decision, "much less that it approved of that decision," it cannot fairly be inferred in that Congress intended to adopt the decision.

† *See* Dissent at 417-4162 and Hearings Before the Senate Committee on Agriculture and Forestry on S.2484 *et al.*, 93d Cong., 2d Sess. 205, 369, 737 (1974); H.R. Rep. No. 93-975 93d Cong.,

Appendix A

The majority's premise—that there was a long standing uniform judicial implication of private rights of action, and that this was recognized by Congress—is thus inaccurate. The majority's contention, flowing from this erroneous premise, that it must be shown that Congress intended to deny a previously implied private right rather than create or approve a private right, is unacceptable. As recognized by the dissent (4111), in *Cannon*, *Redington* and *Lewis*, the Supreme Court required an affirmative showing of Congressional intent to favor a private remedy. In *Redington*, the Court rejected the argument of SIPC "that because Congress did not express an intent to deny a private cause of action under § 17(a), this Court should infer one." 442 U.S. at 571. It concluded that "[i]mplying a private cause of action on the basis of Congressional silence is a hazardous enterprise at best." 442 U.S. at 571.

There is no support for the reverse standard adopted by the majority which would require a showing of Congressional disapproval of an implied right.*

2d Sess. 46, 48 (1974); 119 Cong. Rec. 41333 (Dec. 13, 1973); Hearing on Review of Commodity Exchange Act and Discussion of Possible Changes Before the House Committee on Agriculture, 93d Cong., 1st Sess. 121 (1973); Hearings on H.R. 11955 Before the House Committee on Agriculture, 93d Cong., 2d Sess. 123, 249, 321 (1974).

* *Lorillard* v. *Pons*, 434 U.S. 575 (1978), *Georgia* v. *United States*, 411 U.S. 526 (1973), and *Van Vranken* v. *Helvering*, 115 F.2d 709 (2d Cir. 1940), *cert. denied*, 313 U.S. 585 (1941), relied on by the majority, are simply not relevant to the issue here. "'[T]he well-recognized canon of statutory construction that the reenactment of a statute incorporates preceding judicial interpretations'" (Majority at 4078, *quoting from Van Vranken*, 115 F.2d at 710) applies only to the interpretation of a statute, which is a function of the courts, and not the creation of statutory remedies, which is the role of Congress. And it only applies when the judicial

We submit that rehearing is necessary and we suggest that rehearing in banc is warranted.

July 22, 1980

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interpretation is longstanding or pervasive, not, as here, a single year-old precedent (*Deaktor*). As the dissent points out (4177-4178), in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959), the Supreme Court made clear that even where a judicially created remedy has been uniformly recognized, Congress must affirmatively approve the remedy before it will be treated as if "enacted". *See also SEC* v. *Sloan*, 436 U.S. 103 (1978); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953); *NLRB* v. *A.P.W. Products Co.*, 316 F.2d 899 (2d Cir. 1963). *Cf.* the discussions of the majority and dissent at 4079-4080, 4097 n.39, and 4177-4181.

APPENDIX B

Petition of Heinold Commodities, Inc. for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 79-7402 and 79-7482

NATIONAL SUPER SPUDS, INC., et al.,

Plaintiffs-Appellants,

—against—

NEW YORK MERCANTILE EXCHANGE, et al.,

Defendants,

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,

Defendants-Appellees.

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—against—

JOHN RICHARD SIMPLOT, et al.,

Defendants,

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees.

Appendix B

PETITION OF DEFENDANT-APPELLEE HEINOLD COMMODITIES, INC., FOR REHEARING EN BANC

Defendant-Appellee Heinold Commodities, Inc. hereby petitions the Court for rehearing en banc of the decision in these cases entered by a majority of the panel on July 8, 1980. Rehearing en banc is appropriate and desirable because (i) the issue involved is of extraordinary importance to members of the commodity futures industry, to futures traders, and, indeed, to the public at large; (ii) the issue has sharply divided the district courts, including those within this district, the panel which decided the question on July 8, 1980, and the only other court of appeals addressing the question, *Curran* v. *Merrill Lynch, Pierce, Fenner and Smith, Inc.*, No. 77-1300, SRLR (BNA) G-1 (6th Cir. May 12, 1980); (iii) the majority of the panel seriously misapplied the principles of statutory construction established by the Supreme Court in particularly *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974); *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975); *Cort* v. *Ash*, 422 U.S. 66 (1975); *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); and *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 100 S.Ct. 242 (1979); and (iv) an erroneous decision of this Court may have a particularly serious, adverse impact on the development of the law relating to futures trading.

STATEMENT OF THE CASE

These cases arise out of trading in May 1976 Maine Potato Futures Contracts ("May Contracts") on the New York Mercantile Exchange ("Exchange"). Plaintiffs are

speculators who held long positions in May Contracts which were liquidated prior to the close of trading on May 7, 1976. None of the plaintiffs are customers of the brokerage firms named as defendants in these actions. Defendant Exchange is a commodities exchange designated as a "contract market" for the purchase and sale of certain commodity futures contracts including the May Contracts.

Defendants Heinold Commodities, Inc., Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc., Clayton Brokerage Co. of St. Louis, and Pressner Trading Corp. are commodity futures brokerage firms registered as futures commission merchants with the Commodity Futures Trading Commission ("CFTC") ("short brokers"). Customers who traded through these defendants held short positions in May Contracts and are defendants in these actions ("short sellers").

The complaints in these actions allege that the short sellers and their brokers engaged in a conspiracy to manipulate downward the price of the May Contracts in violation of sections 4a, 4b, and 9(b) of the Act (7 U.S.C. §§ 6a, 6b, and 13(b)) and sections 1 and 2 of the Sherman Antitrust Act and that the Exchange failed to reveal and prevent this manipulation in violation of sections 5(d), 5a(8), and 9(b) of the Act (7 U.S.C. §§ 7(d), 7a(8) and 13(b)).*

In its opinion, the majority of the panel held, contrary to the decision of the District Court (470 F.Supp. 1256 (1979)) and over the dissent of Judge Mansfield, that these plaintiffs have an implied right of action for damages under the Commodity Exchange Act as amended, (the "Act") (7 U.S.C. § 1 *et seq.*) against futures commission

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* A liberal more detailed recitation of the facts alleged by plaintiffs may be found in the majority opinion.

merchants such as the short brokers despite the existence of powerful judicial and administrative means of enforcing the provisions of the Act, including express administrative remedies for plaintiffs' claims against futures commission merchants. The reasons why the majority opinion is incorrect and plainly at odds with the principles to be applied in determining whether Congress intended to create a private cause of action where none is expressly provided are set forth in the dissenting opinion of Judge Mansfield. Because of the great importance of the issues presented, en banc consideration is fully warranted.

ARGUMENT

I. The Majority Erred in Ruling That Because Congress in 1974 Failed Expressly To Repeal The Cause of Action Found to be Implied in Certain Provisions of the Act By A Number of Lower Federal Courts, It *Sub Silentio* Approved and Adopted The Erroneous Decisions of These Courts

The majority's opinion relies heavily on the familiar "canon of statutory construction that the reenactment of a statute incorporates preceding judicial interpretations" citing *Van Vranken* v. *Helvering*, 115 F.2d 709, 710 (2d Cir.), *cert. denied*, 313 U.S. 585 (1940) and several other cases which bear no resemblance to the cases at bar. Slip Opinion at 4078. The majority's argument is that Congress was aware in 1974 that various lower federal courts had found an implied private cause of action in several provisions of the Act and that Congress' failure in the face of these decisions to repudiate the rule enunciated therein is evidence of an intent *sub silentio* to approve and adopt the rule. Slip Opinion at 4061-4062, 4078-4080.

This argument is wholly without merit for the many reasons stated in the dissenting opinion of Judge Mansfield (Slip Opinion at 4109-4118, 4146-4157, 4168-4169, 4177-4183).*

Moreover, the canon must not stand in the way of the courts to correct erroneous doctrine. As the Supreme Court wrote in *Helvering* v. *Hallock*, 309 U.S. 106, 119-121 (1940):

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* The majority fails to point out that in *Van Vranken*, *supra*, the court, in refusing to apply the canon to the circumstances there present, emphasized that:

> "The canon which the taxpayer invokes is sometimes a help, but we must never ignore the more important, though impalpable, factors. Indeed, nothing is so likely to lead us astray as an abject reliance upon canons of any sort; so much the whole history of verbal interpretations teaches, if it teaches anything." (115 F.2d at 711)

In addition, the canon on which the majority places so much stock is generally invoked only to attribute to Congress acceptance of Supreme Court statutory interpretations. See *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this court to such language and made it a part of the enactment.' That judicial construction is made up of the doctrines enunciated by this Court. . . ."); *Hecht* v. *Malley*, 265 U.S. 144, 153 (1924); *Sessions* v. *Romadka*, 145 U.S. 29, 42 (1892). Moreover, although federal regulation of futures trading began as early as 1922, not until 1967, after 45 years of regulation but only eight years before the 1974 amendments to the Act, did a district court erroneously hold, based on the theory of tort rather than congressional intent, that a private action could be maintained under the Act. Thus, as Judge Mansfield points out:

> "[I]t is inappropriate to rely on the presumption asserted by the majority where, as here, Congress has expressly created a number of remedies which may reasonably be viewed as exclusive and where, if Congress intended to adopt a prior judicial interpretation providing for an additional remedy, it would have said so. ***Finally, the body of earlier lower federal court decisional law provides a wholly inadequate basis, either in terms of relevance, weight, period of existence, or notoriety, for such an inference.***"

"Nor does want of specific congressional repudiations of the *St. Louis Union Trust* cases serve as an implied instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with the *Klein* case, make for dissonance of doctrine.

It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. To explain the cause of nonaction by Congress when Congress itself sheds no light is to venture into speculative unrealities . . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction . . . of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."

In *Girouard* v. *United States*, 328 U.S. 61 (1946), the Supreme Court refused to apply the cannon in a case where the judicial precedent supposedly approved and adopted by Congress in its reenactment of legislation was three Supreme Court decisions. These decisions had been wrongly decided by the Court and the erroneous doctrine announced therein would not be presumed to have been adopted by Congress. The decision of the Supreme Court is worth quoting at length:

"We conclude that the *Schwimmer*, *Macintosh* and *Bland* cases do not state the correct rule of law.

We are met, however, with the argument that, even though those cases were wrongly decided, Congress has adopted the rule which they announced. The argument runs as follows: Many efforts were made to

amend the law so as to change the rule announced by those cases; but in every instance the bill died in committee. Moreover, when the Nationality Act of 1940 was passed, Congress reenacted the oath in its pre-existing form, though at the same time it made extensive changes in the requirements and procedure for naturalization. From this it is argued that Congress adopted and reenacted the rule of the *Schwimmer, Macintosh* and *Bland* cases. Cf. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 488-489.

We stated in *Helvering* v. *Hallock*, 309 U.S. 106, 119, that 'It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines.' *It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error.*" (*Girouard, supra*, 328 U.S. at 69-70; emphasis added).

Thus, the majority has no support for its presumption that Congress intended to approve and adopt the incorrect decisions of a number of lower federal courts because it failed expressly to repeat the erroneous rule announced in those cases.

II. The Majority Erred in Applying The Principles of Statutory Construction To Be Used In Determining Whether Congress Has Implied a Private Cause of Action

Not only does the majority improperly place the burden of disproving the existence of an implied private cause

of action on appellees (Slip Opinion at 4061-4062, 4078-4080),* but, in addition, it erroneously rejects the substantial evidence found in the language, regulatory scheme, and legislative history of the statute which shows that Congress did not have an unexpressed intent to create such a remedy in favor of any person let alone plaintiffs in these cases.

The majority, for example, accords little weight to the very language of the provisions on which plaintiffs base their claims** and to Congress' desire to the extent possible to assure natural uniformity in the development of standards governing futures trading.*** In addition, it ignores the lack of any general grant of jurisdiction to the federal courts to enforce the provisions of the Act. In

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* Judge Mansfield correctly described the burden of proof and the parties with whom this burden rests: "the burden is on appellants to show an affirmative Congressional intent to favor an implied private right." (Slip Opinion at 4111). *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 419 (1975); *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974). As Justice Powell stated: "Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action." *Cannon* v. *University of Chicago*, 441 U.S. 677, 731 (1979) (Powell, J., dissenting).

** *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976); *Transamerica, supra*, 100 S.Ct. 242 (1979); *Touche Ross & Co., supra*, 99 S. Ct. at 2485 (1979); *Southeastern Community College* v. *Davis*, —— U.S. ——, 99 S.Ct. 2361, 2369 (1979); *Cannon* v. *University of Chicago, supra*, 441 U.S. 677 (1979); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 472 (1977); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 24 (1977); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring).

*** *See, e.g.*, S.Rep. No. 95-850, 95th Cong., 2d Sess. 13, 26 (1978); H.R. Rep. No. 95-1181, 95th Cong., 2d Sess. 14, 16, 28 (1978).

sharp contrast, the Securities Exchange Act of 1934 contains a general grant of jurisdiction (15 U.S.C. §78aa). In *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 424 (1975), the Supreme Court, in holding that no private right of action was implied in the statute there at issue, emphasized the importance of such jurisdictional language: "Unlike the Securities Exchange Act, the SIPA . . . contains no general grant of jurisdiction to the district courts." Moreover, in *Transamerica, supra*, 100 S.Ct. at 248 n.12, the Supreme Court stated that the omission of certain jurisdictional language was "inconsistent more generally with an intent on the part of Congress to make [a private cause of action for damages] available". Here, Congress omitted entirely any general grant of jurisdiction.*

Where Congress intended to invoke the jurisdiction of the District Courts, Congress made express provision in the Act. Under Section 6 (7 U.S.C. §13a-1), the Commission and the Attorney General of the United States are empowered to sue in district court to enjoin violations of the substantive provisions of the Act. Moreover, in 1978, Congress added a provision empowering States to sue in law or equity in District Court for violations of the Act (7 U.S.C. §13a-2).

Moreover, as Judge Mansfield states in his dissenting opinion:

> "The legislative history of the Act, which runs into hundreds of pages of Committee reports, testimony and debates, fails to contain one word approving a

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* See, in addition, *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 430-31 (1964) where the Supreme Court specifically cited Section 27 (15 U.S.C. §78aa) as an important factor in implication of a private remedy.

right of action, despite reference by a couple of witnesses and a senator to the subject. On the contrary, in 1974 congress failed, after exhaustive hearings, to enact any one of several bills which would have expressly provided a private right of action for violations of the Act. . . . In 1968 Congress had rejected a bill which would have made *contract markets* liable to aggrieved persons for violations of the Act. . . . Moreover, the enactment of a reparations procedure whereby any person injured by a violation of the Act can recover compensatory damages, § 14, and its legislative history, shows not only that "Congress knew how to confer a private right of action when it wished to do so," *Transamerica, supra,* 100 S. Ct. at 248 n.13, but that Congress viewed the reparations procedure, along with the other expressly provided remedies, as sufficient to protect those aggrieved by violations of the Act. H.R. Rep. No. 975, 93d Cong., 2d Sess. 22, 83 (1974). In this respect the Act differs sharply from the Securities Exchange Act of 1934, 78 U.S.C. §§ 78, *et seq.*, relied upon by the majority. . . .')" (Slip Opinion at 4108-4109)

Despite this strong evidence that Congress did not intend to create a private cause of action, the majority erroneously chooses to rely upon (i) snippets of testimony which by no stretch of their language reveal Congressional approval of a private cause of action, (ii) an unfair, strained reading of a "savings clause," and (iii) a presumption based upon Congressional silence expressly to repeal erroneous case law.

III. The Majority Erred in Its Seriously Strained Reading of Section 4b

By its terms, section 4b, contrary to the majority's ruling, is intended to prohibit a broker from cheating or defrauding his customer in connection with the making of a futures contract. See Slip Opinion at 4126-4130, Mansfield, J., dissenting. As stated in *Chipser* v. *Kohlmeyer & Co.*, 600 F.2d 1061, 1065 n.7 (5th Cir. 1979): "Section 4b makes it unlawful for a commodities broker 'to cheat or defraud' a *customer* or willfully to deceive or make false statements or reports, to a *customer* in connection with transactions in the commodities exchange." (Emphasis added)

Because the language of section 4b indicates that it was intended to protect only customers against fraud on the part of brokers acting on their behalf, "it would take a very clear expression in the legislative history of congressional intent to the contrary to justify the conclusion that the statute does not mean what it plainly seems to say." *Aaron* v. *Securities & Exchange Comm'n*, 48 U.S.L.W. 4609, 4614 (June 2, 1980). But the legislative history contains no such clear expression of contrary congressional intent. Indeed, the legislative history establishes beyond cavil that section 4b was intended only to protect a customer from the cheating or fraud of his own broker. The 1934 House Report on what was to become Section 4b states:

> "Section 4b prohibits traders in acting for *customers* in futures transactions to cheat, defraud, or deceive *customers*, or to bucket or offset such orders against orders for others. H. R. Rep. No. 1637, 73d Cong., 2d Sess. 5 (1934). (Emphasis added).

The 1935 House Report confirms that interpretation:

> "Section 4b makes it unlawful for members of contract markets, and correspondents, agents, and employees thereof, in connection with orders to make or the making of contracts of sale of any commodity in interstate commerce to cheat, defraud, or deceive the *customer*, or to bucket the order." H. R. Rep. No. 421, 74th Cong., 1st Sess. 5 (1935). (Emphasis added).

See, in addition, S.Rep. No. 947, 90th Cong., 2d Sess. 6 (1968); 113 Cong. Rec. 23651 (August 22, 1967) (remarks of Congressman Hathaway).

Hence, the majority erred in holding that section 4b confers a private cause of action upon these plaintiffs, none of whom are customers of the short brokers, against the short brokers.

IV. The Majority Erred in Holding That Section 9(b) of Act, A Criminal Provision Which By Its Terms Simply Proscribes Certain Conduct and Does Not Create Or Alter Any Civil Liabilities, Gives Rise to A Private Cause of Action

Section 9(b) provides:

> "It shall be a felony . . . for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity. . . . "

Thus, as with Section 206 of the Investment Advisors Act, Section 9(b):

> ". . . simply proscribes certain conduct, and does not in terms create or alter any civil liabilities. If mon-

etary liability to a private plaintiff is to be found, it must read it into the Act." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 100 S.Ct. 242, 247 (1979); *Kissinger* v. *Reporters Committee for Freedom of the Press*, 48 U.S.L.W. 4223, 4226 (March 3, 1980).

The majority is completely unable to plumb from the legislative history of the Act a scintilla of evidence that Congress intended to provide any person with a private cause of action for violation of Section 9(b). As Judge Mansfield put it:

> ". . . § 9(b) like § 4b, does not disclose any desire to benefit a special class of which plaintiffs are members. When read in the light of the Act's overall purposes it appears to have been enacted for the benefit of the public, including producers and consumers of commodities, not that of speculators or investors. In any event, even assuming *arguendo* that this criminal statute benefits speculators, there is not the slightest suggestion in the language or legislative history of § 9(b) that Congress impliedly intended it to be enforced by private civil suits for damages. The remedies provided by Congress are found elsewhere in the Act." (Slip Opinion at 4141-4142).

Accord, Liang v. *Hunt*, 477 F.Supp. 891 (N.D. Ill. 1979).

V. The Majority Erred in Holding That Section 4a of the Act Gives Rise To A Private Cause of Action

Section 4a of the Act (7 U.S.C. § 6a) was enacted in 1936 to authorize federal regulatory authorities to set limits on speculative trading. As Judge Mansfield's dissent points out, nowhere in the language of this section or in its

legislative history is there any evidence that Congress intended to create a private cause of action for breach of this provision. Slip Opinion at 4141-4142 n. 8, Mansfield, J., dissenting.

Conclusion

For the reasons stated above, the Petition of Defendant-Appellee Heinold Commodities, Inc. for Rehearing En Banc should be granted.

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APPENDIX C

Petition of Clayton Brokerage Co. of St. Louis, Inc. for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 79-7402

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs, Appellants,

v.

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, and ALFRED PENNISI,

Defendants-Appellees.

PETITION OF CLAYTON BROKERAGE CO. OF ST. LOUIS, INC. FOR REHEARING AND SUGGESTION OF APPROPRIATENESS OF A REHEARING IN BANC

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Clayton Brokerage Co. of St. Louis, Inc. ("Clayton"), one of the Defendants-Appellees herein, herewith petitions this Court to grant a rehearing in the above entitled cause and respectfully suggests that the question presented by this cause is one of exceptional importance which warrants the consideration of the Court sitting in Banc.

Appendix C

I. Petition for Rehearing

Clayton petitions the Court for a rehearing, pursuant to Rule 40, Fed. R. App. P., for the reason that in reaching its conclusion that a private right of action to enforce the provisions of the Commodity Exchange Act, 7 U.S.C. §§1-24 (the "CEA") exists on behalf of the Plaintiffs-Appellants herein, the Court misapprehended the decisions of the United States Supreme Court in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, —— U.S. ——, 62 L. Ed. 2d 146 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); and *Cannon* v. *University of Chicago*, 441 U.S. 667 (1979) and overlooked and misapprehended certain other matters, as set forth herein.

A. *The Proper Line Of Inquiry Is Whether Congress Intended To Create A Private Right of Action To Recover Damages Based Upon Violations Of The Commodity Exchange Act*

The Court's approach to determining whether a private right of action should be implied from the provisions of the CEA directly conflicts with the approach mandated by the decisions of the Supreme Court in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, —— U.S. ——, 62 L. Ed. 2d 146 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 61 L. Ed. 2d 82 (1979); and *Cannon* v. *University of Chicago*, 441 U.S. 667, 60 L. Ed. 2d 560 (1979). In the cited cases the Court held that the question of whether a private right of action for damages may be implied from a federal statute which makes no express provision for such right of action must be decided on the basis of whether Congress intended to create the private right of action sought to be maintained. *Transamerica Mortgage Advisors,*

Inc. v. *Lewis*, 62 L. Ed. 2d at 152; *Touche Ross & Co.* v. *Redington*, 61 L. Ed. 2d at 91; *Cannon* v. *University of Chicago*, 60 L. Ed. 2d at 560. The issue before this Court in this case, broadly stated, was whether a private right of action for damages should be implied from the CEA. This Court determined the issue, not by evaluating whether Congress intended to create a private right of action for violations of the CEA, but by determining "whether [Congress] intended *sub silentio* to alter the significance which had long been given [the provisions of the CEA] by making other changes in the Act." Slip Op. at 4061. By deciding the issue on this basis, the court has, in effect, condoned the decisions of other courts (those which this Court viewed as having previously determined the significance of the provisions of the CEA) in which those courts "assume[d] policy making authority vested by the Constitution in the Legislative Branch." *Cannon* v. *University of Chicago*, 60 L. Ed. 2d at 604 (Powell, J., dissenting). Moreover, the Court's decision ascribes an affirmative intent to Congressional inaction despite the fact that Congress has no duty "to disavow or disassociate itself from prior lower court decisions as if they were statutes enacted by it. *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464 (1968)." Slip Op. at 4110. In so doing, this Court has, in effect, assisted "Congress to avoid resolution of the often controversial question whether a new regulatory statute should be enforced through private litigation." *Id.* This clearly contravenes the letter and the spirit of the Supreme Court decisions cited above. It is the duty of Congress, not the courts, to take the affirmative action required to create a statutory right of action.

B. ***The Court Erred in Concluding that Congress Was Aware of and Ratified Decisions Upholding the Existence of the Private Right of Action Sought to be Enforced in This Case.***

This Court's decision rests primarily on the grounds that Congress was aware of those decisions finding a private right of action under the CEA which were rendered prior to the enactment of the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389 (1974) and failed to take any action expressly renouncing those decisions. As the dissent in this case accurately pointed out, none of the cases decided prior to the enactment of the CFTC Act involved a claim analogous to the claims asserted against Clayton in this suit; most involved claims by customers against their brokers, not claims by speculators against unrelated brokers. Slip Op. at 4110. There was but a single suit, *Deaktor* v. *L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.) *rev'd on other grounds sub nom., Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973) that even remotely resembled the private right of action here pursued by the Plaintiffs-Appellants; that suit involved a claim by a trader against an Exchange and ended without resolution of the issue of a private right of action under the CEA. During the extensive hearings and deliberations concerning the CFTC Act, none of the cases which found a private right of action existing under the CEA was cited to Congress for that proposition. The basis for the court's decision is too frail to support the conclusion reached. The court *presumes* that Congress was aware of the decisions (and, of course, that Congress *considered* the decisions), the court *presumes* that Congress would have spoken explicitly had it not in fact agreed with the decisions, and finally the court *presumes* that since Congress (based upon the court's presumptions) approved of the specific forms

of private damage actions which the courts had previously countenanced, Congress has approved all private rights of action for damages based upon violations of the CEA. At *most,* if Congress was, in fact, aware of the prior cases, Congress might be presumed to have acquiesced to suits by customers against their brokers; this is not such a suit and cannot be analyzed as such.

C. *Congress Acted Affirmatively to Deny the Existence of a Private Civil Action for Damages Against Futures Commission Merchants*

The presumptions upon which the court's conclusion rests are, in any event, rebuttable. Slip Op. at 4080. Congress's actions, which must be accorded greater weight than its inactions, demonstrate that in fact it did not intend that a private right of action should be available under the CEA against futures commission merchants such as Clayton.

Prior to 1974, as the court's opinion implicitly concedes, Slip Op. at 4062, there was nothing to indicate that Congress intended that private rights of action to be available under the CEA. In 1974, Congress dealt with proposed legislation which would have expressly created private rights of action for violation of the CEA. Extensive hearings were held concerning the proposed legislation and during those hearings Congress was urged to adopt the provisions which expressly would have created a private right of action. *See, e.g., Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry,* 93rd Cong. 2d Sess. 77, 118-119, 205, 737, 746. Congress, however, rejected the importunings of the witnesses who testified before it, and declined to enact those provisions. It did, however, enact Section 14 of the CEA, 7 U.S.C. §18, which created the reparations proceeding.

The court's opinion glosses over the rejection of these provisions, notwithstanding the decision of the Supreme Court on precisely this point in *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453 (1974) (which the Court finds, inexplicably, to be "inappropriate"). While it may be true that "unsuccessful attempts at legislation are not the best guides to legislative intent" Slip Op. at 4097, where, as here, such attempts are among the few ascertainable acts of Congress which in any respect indicate the Congressional intent sought to be ascertained, they must be accorded proper recognition.

Here, it must be presumed to indicate that the sponsors of the proposed legislation were unable to muster sufficient support to enact the provisions which would have established the private right of action which the Plaintiffs-Appellants pursue in this case.

The Court's disregard for the Congressional intent expressed in the enactment of the reparations procedure is equally improper. The two reasons cited for this treatment, an expressed Congressional intent to strengthen commodity futures regulation and the evolution of a jurisdictional savings clause which was included in the CFTC Act, are insufficient to justify the summary disregard of the careful limitations imposed on the private remedy which Congress did see fit to create. The legislative history to the reparations proceedings reflects that the reparations proceedings were considered by Congress to be the only available statutory remedies for violation of the act other than the arbitration procedures which the exchanges and the futures association were required to make available to injured commodity traders. H.R. Rep. No. 93-975, 93rd Cong., 2d Sess. 22, 83 (1974). In light of this assumption, the enactment of the reparations proce-

dure could only have been seen by Congress as strengthening the existing statutory scheme; Congress simply did not view private civil actions as an available statutory remedy. Thus, the enactment of reparations as a remedy to the exclusion of court actions is not at all inconsistent with the intent to strengthen the regulation of the futures industry.

The legislative history similarly provides an explanation for the jurisdictional savings provision which indicates that it was not intended to preserve private rights of action under the CEA. Rep. Rodino, Chairman of the House Judiciary Committee, described the provision as one which was intended to preserve the jurisdiction of the Courts over claims such as anti-trust claims, and contract and commercial law claims. *Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before The Senate Committee on Agriculture and Forestry,* 93rd Cong. 2d Sess. 259-60 (1974). No one in the entire course of the legislative history stated that the jurisdictional savings clause was intended to preserve private rights of action arising under the CEA.

Neither basis upon which the Court disregarded the clear implication of the enactment of the reparations procedure is substantiated by an examination of the applicable legislative history. Thus, even under the standard of analysis most favorable to the position of the Plaintiffs-Appellants, it is clear that Congress intended to deny the private right of action, the existence of which is at issue in this case.

II. Suggestion of Appropriateness of a Hearing by the Court In Banc

Clayton respectfully suggests that, pursuant to Rule 35 Fed. R. App. P., this case should be reheard by this Court in Banc.

This Court has recognized the importance of the issue presented by this case. Slip Op. at 4021. It is an issue on which the district courts, both within and without this Circuit, are sharply divided. Only two of the United States Courts of Appeal, this Court and the Court of Appeals for the Sixth Circuit, in *Curran* v. *Merrill Lynch, Pierce, Fenner & Smith,* No. 77-1300 (6th Cir. 1980), have reached the issue. In each case, the decision rendered was reached by a divided court, with the dissenting Judge filing a viogorous and well supported opinion.

We respectfully suggest, therefore, that this case presents an issue of such magnitude and importance that it warrants the consideration of all the members of this Court, sitting in Banc.

On the grounds and for the reasons stated, Clayton Brokerage Co. of St. Louis, Inc. respectfully asks for a rehearing of this case by this Court, sitting in Banc.

Respectfully submitted,

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APPENDIX D

Petition of Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc. for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 79-7402, 79-7464 and 79-7482 (CONSOLIDATED)

No. 79-7402

NEIL LEIST, PHILIP SMITH and INCOMCO,

Plaintiffs-Appellants,

—against—

JOHN RICHARD SIMPLOT, et al.,

Defendants,

and

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC., HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC., NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER, ALFRED PENNISI,

Defendants-Appellees.

No. 79-7464

INCOMCO,

Plaintiff-Appellant,

—against—

WAYNE COUNTY PRODUCE CO. and HAROLD COLLINS,

Defendants,

and

NEW YORK MERCANTILE EXCHANGE,

Defendant-Appellee.

Appendix D

No. 79-7482

NATIONAL SUPER SPUDS, INC., et al.,
Plaintiffs-Appellants,

—against—

NEW YORK MERCANTILE EXCHANGE, et al.,
Defendants,

and

HEINOLD COMMODITIES, INC., THOMPSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

Appellee Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc. (hereinafter Thomson) respectfully petitions this Court for rehearing of the appeal decided herein on July 8, 1980 and also respectfully suggests the appropriateness of rehearing *in banc*.[1]

The decision of the panel rendered on July 8, 1980 addresses an extremely important issue—whether or not a private right of action may be implied on behalf of speculators in commodities under §§ 4b and 9(b) of the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 6b and 13(b), against brokers such as Thomson who are members of the New York Mercantile Exchange and registered with the Commodity Futures Trading Commission.[2]

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[1] Pursuant to Fed. R. App. P. 40 and 35 and 28 U.S.C. § 46(c).

[2] The decision also considers private rights of action against the contract market and its officials under §§ 5(d), 5a(8) and 9(b) of the Act, 7 U.S.C. §§ 7(d), 7a(8) and 13(b).

Each of the other brokers involved in this case, Heinold Commodities, Inc. and Clayton Brokerage Co. have already petitioned this Court for a rehearing. Also, the contract market and its officials, Appellees New York Mercantile Exchange, Richard B. Levine, Howard Gabler and Alfred Pennisi have petitioned for rehearing with a suggestion for a rehearing *in banc*. Thomson believes these petitions set forth all of the arguments in support of the petition for rehearing with a suggestion for a rehearing *in banc*.[3]

Conclusion

Wherefore, it is respectfully urged that this Petition for Rehearing and Suggestion for Rehearing *in banc* be granted, and that upon such rehearing, the Judgment below be affirmed in accordance with the dissenting opinion of Circuit Judge Mansfield.

Respectfully submitted,

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[3] Pursuant to Fed. R. App. P. 28(i), Thomson adopts each of these arguments by reference.

CORRECTED COPY

No. 80-203

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
PETITIONER,

vs.

J. J. CURRAN AND JACQUELYN L. CURRAN,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF PETITIONER, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

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QUESTION PRESENTED FOR REVIEW

I.

Does the Commodity Exchange Act implicitly create a private right of action for fraud in favor of a customer against his broker?

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OPINIONS BELOW

The Opinion of the District Court (A39-A49)[1] is not officially reported. The Opinion of the Court of Appeals (A1-A38) is reported at 622 F.2d 216 (6th Cir. 1980).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The Judgment of the Court of Appeals was entered on May 12, 1980. Petitioner timely filed its petition for a writ of certiorari, which this Court granted on April 22, 1981.

STATUTES INVOLVED

Section 4b of the Commodity Exchange Act ("CEA"), 88 Stat. 1413, 7 U.S.C. §6b (1974) and other pertinent sections of the Act are appended to the petition for a writ of certiorari. (A52-A57)

STATEMENT OF THE CASE

In 1973, Respondents J.J. Curran and Jacquelyn L. Curran (the "Currans") opened several commodity trading accounts with petitioner, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), a futures commission merchant ("FCM") registered as such with the Commodity Futures Trading Commission ("CFTC") pursuant to section 4f of the CEA, 7 U.S.C. §6f. Merrill Lynch, as an FCM, acts as a broker for persons desiring to trade commodity futures contracts, buying and selling futures contracts for the accounts of its customers on

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[1] "A__" page references are to the Appendix to the petition for a writ of certiorari. "B__" page references are to the Appendix to this brief containing Code of Federal Regulations sections. "JA__" page references are to the Joint Appendix submitted with this brief under separate cover.

the various contract markets of which it is a member. Upon opening the accounts, the Currans signed agreements to submit to arbitration disputes that might arise with Merrill Lynch.

The commodity trading in the Currans' accounts resulted in losses and the accounts were closed in April, 1974. In April, 1976, the Currans brought suit for damages in the United States District Court for the Eastern District of Michigan. The Currans alleged violations of sections 5 (failure to register), 12(2) (misleading statements) and 17(a) (fraud) of the Securities Act of 1933, 15 U.S.C. §§77e, 771(2), 77q(a); section 15(c)(1) (fraud and rulemaking powers) of the Securities Exchange Act of 1934, 15 U.S.C. §78o(c)(1), and Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5. The Currans also alleged violation of section 4b (fraud) of the CEA, 7 U.S.C. §6b,[2] as well as breaches of duties owed under the Michigan Uniform Securities Act, rules and regulations of the National Association of Securities Dealers, the New York Stock Exchange and the Chicago Mercantile Exchange, and common law principles of fraud, negligence and contract. Jurisdiction was alleged pursuant to section 22(a) of the 1933 Act, 15 U.S.C. §77v(a); section 27 of the 1934 Act, 15 U.S.C. §78aa; §§1331, 1332 and 1337 of Title 28 of the United States Code; and by virtue of pendent jurisdiction.

Upon Merrill Lynch's motion, the District Court dismissed the Currans' claims under the 1933 and 1934 Acts and directed the remaining claims to arbitration in accordance with the parties' agreement. In so ruling, the District Court held that the Currans' commodity trading accounts did not

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[2] The Complaint (JA6-21) alleges activities (fraud) such as are made unlawful by section 4b of the CEA, 7 U.S.C. §6b. The Complaint actually specifies violation of "Section 6 of the Commodity Exchange Act." Petitioner assumes, however, as did the Court of Appeals (A37) that Respondent seeks recovery under CEA section 4b, 7 U.S.C. §6b.

constitute "securities" within the meaning of the 1933 and 1934 Acts and that, upon dismissal of the federal securities claims, there was no impediment to enforcement of the arbitration agreement in accordance with the Federal Arbitration Act, 9 U.S.C. §3.[3]

The Currans appealed from the District Court's ruling that no cause of action had been stated under the federal securities laws and also argued that the District Court had erred in submitting the dispute to arbitration because the arbitration agreement did not conform to requirements set forth in CFTC Reg. §180.3, 17 C.F.R. §180.3. That regulation (A58), effective November 29, 1976, provides that, to be enforceable, arbitration clauses must, *inter alia*, be signed separately and apprise the customer, in bold-face type, that he may be waiving a right to sue in court. The arbitration agreements signed by the Currans in 1973 do not meet these requirements.

The Court of Appeals unanimously affirmed the District Court's ruling that the Currans' federal securities claims should be dismissed for the reason that no security was involved. The Court also adopted the Currans' argument that CFTC Reg. §180.3 should be applied retroactively to invalidate the arbitration agreement between the parties.

The Court of Appeals then raised, *sua sponte*, the issue of whether a private cause of action exists under the anti-fraud provisions of the CEA. Without benefit of briefing or argument by the parties, a majority of the panel concluded that the CEA provides an *implied* private right of action for fraud. The Court accordingly reversed the District Court's order staying the CEA claims pending arbitration, remanding those

---

[3] Merrill Lynch conceded that *Wilko v. Swan*, 346 U.S. 427 (1953), precluded enforcement of the arbitration agreement so long as the federal securities claims remained at issue.

claims for trial on the merits. Judge Phillips dissented, reasoning that Congress' creation of an administrative reparations procedure under the CEA and its concomitant failure expressly to provide a private judicial remedy precludes the inference of such a right.

Merrill Lynch sought review in this Court of the Court of Appeals' decision to infer a private judicial remedy under the CEA and its decision retroactively to apply the requirements of CFTC Reg. §180.3. This Court granted certiorari as to the first question only.

SUMMARY OF ARGUMENT

The sole question presented is whether the CEA provides, to a trader of commodity futures contracts, a right to bring an action against an FCM in the United States District Court to recover damages for violations of section 4b of the CEA. The CEA does not expressly confer this substantive right. Accordingly, the question to be considered by this Court is whether Congress intended to create, and enacted by implication, a private right of action.

The inquiry may begin and conclude with examination of the language and structure of the statute itself. *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). The CEA, by its express terms, grants exclusive regulatory control over commodity futures trading to the CFTC. The regulatory purview of the Act is comprehensive, covering all aspects of commodity futures trading and all of the various classes of participants in the futures markets. Detailed licensing and organizational requirements, standards of conduct, proscribed activities and a broad panoply of enforcement measures and remedial proceedings are expressly provided for in the Act. The express enactment of such

pervasive enforcement and remedial measures is inconsistent with the existence of any additional implied substantive right for private enforcement. The express terms and structure of the statute itself therefore dispose of the question of the existence of an implied private right of action and compel a negative conclusion.

Other indicia of legislative intent suggested in *Cort v. Ash*, 422 U.S. 66 (1975), and refined in *Transamerica* and *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), compel the same conclusion. The CEA makes it clear that speculators such as the Currans are not a class of persons for whose *especial* benefit the anti-fraud provisions of the CEA were enacted. The CEA does not focus its protection on any particular group. Second, there is no indication of explicit or implicit legislative intent to grant the private right of action alleged by the Currans. The comprehensive enforcement scheme expressly provided in the CEA creates a presumption against the existence of an additional implicit remedy and there is no clear evidence in the legislative history or elsewhere of any contrary legislative intent. Third, it would be inconsistent with the underlying purpose of the legislative scheme to infer such a private right of action. The legislative scheme carefully balances the interests of all sectors of the commodity futures markets by providing for the duties, obligations and standards of conduct set forth in the Act together with the expressly provided remedies. Creation of a private judicial damage remedy would alter that balance, contrary to the intent of Congress. The fourth inquiry suggested by *Cort* also weighs against inference of a cause of action in the federal courts. Notwithstanding that commodity regulation is a matter of federal concern not traditionally relegated to state law, the statute expressly provides for coherent, expert agency regulation and an administrative remedy. The uniform, integrated and preemptive regulation that Congress sought

would be frustrated by judicial creation of a right to proceed in the first instance with private claims in the federal courts.

The analysis incorporating the foregoing considerations has been developed in the previous decisions of this Court to permit principled adjudication of the question of implied private rights of action and to prevent judicial arrogation of the legislative function that article I of the United States Constitution places solely in the Congress. Application of that analysis and adherence to the underlying constitutional principle compels the conclusion that there is no private right of action under section 4b of the CEA.

I.

A Judicially Created Private Right of Action is Inconsistent with the Express Provisions of the CEA and the Regulatory Scheme it Establishes.

A. The Reason for Regulation

The importance to the national economy of the commodity futures markets regulated by the CEA cannot be overstated. Availing themselves of the hedging function provided by futures markets, farmers and other producers of commodities are able to protect themselves against declines in the cash prices of their commodities by assuming short positions in futures contracts for those same commodities. Similarly, processors and other commercial users of commodities can protect themselves against upward movement of commodity prices by assuming long positions in futures contracts for the commodities they will later acquire. Having thus abated the risk of adverse market price movement, processors are able both to pay higher prices to farmers and other producers, and to pass along processed goods to the ultimate consumer without the added cost that vulnerability to the unabated risk

would impose. Having similarly hedged against the risk of downward market price movement, farmers are better able to plan and finance future operations. Indeed, many lenders require hedging in the commodity futures market as a condition of loans to agricultural enterprises.[4]

The risk shifting mechanism provided by commodity futures markets has a pervasive effect on the national economy. The commodities in which futures contracts are traded, subject to CEA regulation, are the very staples of agriculture, finance and industry.[5] An orderly futures market is therefore of paramount importance not only to producers and commercial users of commodities, and to the exchanges, brokers and speculators involved in the market itself, but also

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[4] *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess. 539 (1974) (statement of Frederick G. Uhlmann); *Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 Before the House Comm. On Agriculture*, 93d Cong., 2d Sess. 130-31 (1974) (statement of C. L. William Haw).

[5] The following commodities are traded on the designated contract markets listed below:

Chicago Board of Trade

commercial paper	silver	corn
soybean meal	GNMA certificates	soybean oil
gold	soybeans	plywood
stud lumber	oats	
U.S. Treasury bonds	wheat	

Chicago Mercantile Exchange

butter	Idaho potatoes	cattle
live hogs	eggs	lumber
frozen boneless beef	skinned hams	frozen pork bellies
turkeys	grain sorghums	iced broilers

Citrus Associates of the New York Cotton Exchange

orange juice

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to the general population which benefits by the stabilized availability and price of goods that an orderly futures market promotes.

A 1980 report indicates the regulated industry includes 329 brokerage firms, 555 money managers, 914 trading advisors

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Commodity Exchange

copper	British pounds	gold
Canadian dollars	silver	

International Monetary Market of the Chicago Mercantile Exchange

British pounds	gold	Canadian dollars
Japanese yen	copper	Mexican pesos
Deutschmarks	Swiss francs	Dutch guilders
U.S. silver coins	French francs	U.S. Treasury bills

Kansas City Board of Trade

corn	soybeans	grain sorghums
wheat		

MidAmerica Commodity Exchange

cattle	silver	corn
soybeans	gold	U.S. silver coins
hogs	wheat	oats

Minneapolis Grain Exchange

barley	oats	corn
rye	flaxseed	soybeans
frozen pork bellies	wheat	

New Orleans Commodity Exchange

rice

Coffee, Sugar and Cocoa Exchange of New York

coffee	sugar	cocoa

New York Cotton Exchange

cotton

New York Futures Exchange

Swiss francs	Deutschmarks	British pounds
Yen	Canadian dollars	Treasury bills

20-Year Treasury bonds

Ninety-day Certificates of Deposit (starting July 9, 1981)

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and over 31,000 salesmen,[6] with futures trading now occurring on some fourteen exchanges.[7] In the last decade the volume of commodity futures contracts traded has expanded sevenfold and what was previously a business primarily of interest to floor traders and commercial hedgers now involves hundreds of thousands of individual investors.

B. The Statute

Although the federal government has been involved in commodities regulation since passage of the Grain Futures Act of 1922, and expanded its regulatory powers by passage of the CEA in 1936 and by amendment in 1968, it was not until 1974 that Congress, in response to a virtual explosion in futures trading activity[8] and to a perceived inadequacy of existing regulation, sought to bring the entire commodity

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New York Mercantile Exchange

Belgian francs	industrial fuel oil	British pounds
Italian lira	butter	Japanese yen
Canadian dollars	Maine potatoes	Deutschmarks
Mexican pesos	Dutch guilders	palladium
frozen boneless beef	platinum	gold
Swiss francs	heating oil	U.S. silver coins

Petroleum Associates of the New York Cotton Exchange

crude oil	liquified propane

Wool Associates of the New York Cotton Exchange

wool

[6] Remarks of Philip F. Johnson, Chairman, ABA Committee on Commodities Regulation, 35 Bus. Law. 691 (special issue) (March 1980).

[7] *See* note 5, *supra*.

[8] Total trading volume in commodity futures contracts rose from approximately 9.5 million contracts in 1967 to 32.2 million contracts in 1975. S. Rep. No. 95-850, 95th Cong., 2d Sess. 13, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 2087, 2101.

futures market and all related activities under one broad regulatory umbrella.

Prior to 1974, regulation of the field was diffuse and erratic, combining elements of industry self-regulation; limited regulation by the old Commodity Exchange Commission; regulation by other federal agencies, such as the SEC; and regulation under innumerable state laws (e.g., state securities laws, state consumer protection laws). As one commentator described the situation:

> "The potential for a hodge-podge of regulatory requirements, acting in counter-working or conflicting fashion to one another, clearly was present — unless of course Congress centralized regulatory power in a single federal agency."[9]

By enactment of the Commodity Futures Trading Commission Act of 1974 ("1974 Amendments") Congress effected a sweeping revision and quantum expansion of the scope of the Act. The 1974 Amendments have as their cornerstone the creation of the CFTC, a new and expert agency vested with "*exclusive* jurisdiction"[10] over the regulation of commodity futures trading and related activities. The 1974 Amendments provide for comprehensive oversight of the industry by an expert agency vested with sure and diverse enforcement powers.

Mindful of the magnitude and the complexity of the economic activities to be regulated and the diversity of the often conflicting interests of the various sectors of the economy involved, Congress enacted a full and comprehensive regulatory program to regulate the commodity futures markets and all related activities:

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[9] Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 Vand. L. Rev. 1, 5 (1976).

[10] Section 2(a)(1), 7 U.S.C. §2 (emphasis added).

> "The Commodity Futures Trading Commission was created in order to assure that a single expert agency would have the responsibility for developing a coherent regulatory program encompassing futures trading and related activities. Therefore, Congress has vested in the Commission exclusive jurisdiction to build upon the foundation provided by the Commodity Exchange Act in erecting a sound and strong Federal regulatory policy governing futures trading."[11]

The comprehensive scope of the CEA following its amendment in 1974 manifests the expressed congressional intent to bring all aspects of the commodity futures market under the supervision of one agency, the CFTC;[12] to insure that the Commission is equipped with the expertise necessary to develop and provide effective regulation,[13] and with statutory and rulemaking powers to implement that regulation;[14] and to provide the Commission with a broad range of penal and remedial powers[15] to enforce compliance.

The intent of Congress to vest uniform, coherent control in an expert regulatory body with exclusive jurisdiction over

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[11] S. Rep. No. 95-850, 95th Cong., 2nd Sess. 13, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 2087, 2101.

[12] Section 2(a)(1), 7 U.S.C. §2.

[13] Section 2(a)(2) 7 U.S.C. §4a(a)(1) provides:

> "[T]he President shall seek to establish and maintain a balanced Commission, including, but not limited to, persons of demonstrated knowledge in futures trading or its regulation and persons of demonstrated knowledge in the production, merchandising, processing or distribution of one or more of the commodities or other goods and articles, services, rights and interests covered by this chapter."

[14] Section 2(a)(11), 7 U.S.C. §4a(j); Section 8a(5), 7 U.S.C. §12a(5).

[15] *See* notes 17-25, *infra*, and accompanying text.

futures trading is embodied in and fully effectuated by the express language and structure of the CEA. Especially noteworthy in the context of this case are the enforcement and remedial powers provided for in the Act.

With respect to FCMs such as petitioner Merrill Lynch, the Commission has authority to suspend trading privileges[16] and to revoke or suspend the FCM's registration for violation of any provision of the Act or rules, regulations or orders of the CFTC, and is empowered to assess a civil penalty of up to $100,000 for each violation.[17] The Commission is empowered to deny FCM registration to persons deemed unfit for reasons set forth in the statute[18] and to compel contract markets to refuse trading privileges to FCMs that are the subject of disciplinary action.[19] Other specified acts of misconduct are made felonies under the Act, punishable by a fine of up to $500,000 ($100,000 if the violator is an individual) and imprisonment of up to five years, or both.[20] One act so punishable is knowing violation of the section at issue here, section 4b.[21] The Commission is also empowered to proceed in the United States district courts to enjoin existing or threatened violation of any section of the CEA, or rules, regulations or orders of the Commission,[22] and the district

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[16] Section 6(b), 7 U.S.C. §9. *See also* section 8b, 7 U.S.C. §12b (making it unlawful for any person to trade in futures in contravention of an outstanding Commission order prohibiting him from trading).

[17] Section 6(b), 7 U.S.C. §9.

[18] Section 8a(2), 7 U.S.C. §12a(2).

[19] Section 6(b), 7 U.S.C. §9.

[20] Section 9, 7 U.S.C. §13.

[21] *Id.*

[22] Section 6c, 7 U.S.C. §13a-1.

courts are expressly granted jurisdiction over such suits. Additionally, state attorneys general are given authority to bring similar actions for injunctive relief and the recovery of damages on behalf of residents of their respective states,[23] and jurisdiction over such suits is again expressly conferred upon the United States district courts. In furtherance of its enforcement function, the Commission is granted subpoena powers over persons and documents and, again, the district courts are expressly granted jurisdiction to enforce those powers.[24]

Of particular importance to the instant case is the provision in section 14 of the CEA, 7 U.S.C. §18, for reparation proceedings on behalf of any person claiming a violation, on the part of any person required to be registered under the Act, of any provision of the CEA, or rule, regulation or order promulgated thereunder. This section provides to individuals such as the Currans a full and complete remedy for losses sustained as a result of wrongdoing such as they allege, but it is a remedy statutorily provided within the framework of the uniform, cohesive and expert CFTC administration of commodity futures trading that is the cornerstone of the 1974 Amendments.

Reparation proceedings are structured by statute and by regulation[25] to provide claimants with every opportunity fully and fairly to present their claims as in a court of law. Opportunity is granted for a hearing before an Adminstrative Law Judge and the regulations provide for subpoena powers and for discovery and other adjudicatory procedures comparable to those available in the courts.[26] Following hearing before the

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[23] Section 6d, 7 U.S.C. §13a-2.

[24] Section 6(b), 7 U.S.C. §15.

[25] 17 C.F.R. §§12.1-12.102 (B1-29).

[26] The following sets forth the substance of many of the CFTC reparation rules, and includes citations to those rules and to comparable provisions of the applicable Federal Rules:

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Administrative Law Judge, the Commission must make a determination whether the respondent has violated any provision of the CEA, or any rule, regulation or order promulgated thereunder. If the Commission finds that a violation has occurred it *shall* determine the amount of damages to which the person is entitled and make an order directing the offender to

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A complaint shall briefly state the facts in a manner permitting each fact to be admitted or denied (17 C.F.R. §12.21(a), Fed. R. Civ. P. 10(b)); the complaint shall be signed under oath by the complainant or his authorized agent (17 C.F.R. §12.21(b), Fed. R. Civ. P. 11); the answer shall specifically state the facts and grounds for each defense (17 C.F.R. §12.23(b)(1), Fed. R. Civ. P. 8(b) and (c)); the answer shall specifically admit, deny or explain each of the allegations of the complaint (17 C.F.R. §12.23(b)(1), Fed. R. Civ. P. 8(b)); the respondent may file a counterclaim arising out of the same transaction or occurrence (17 C.F.R. §12.23(b)(2), Fed. R. Civ. P. 13(a)); failure to answer may result in a default without a hearing (17 C.F.R. §12.26(a), Fed. R. Civ. P. 55(a)); pleadings shall be amended to conform to the evidence (17 C.F.R. §12.45(d), Fed. R. Civ. P. 15(b)); motions can be made for any form of relief not otherwise specifically provided for in the rules (17 C.F.R. §§12.43(h), 12.46, Fed. R. Civ. P. 7(b)); interlocutory review may be obtained of rulings on controlling questions of law or policy where immediate appeal will advance ultimate resolution of the issue (17 C.F.R. §12.47(a), 28 U.S.C. §1292(b), Fed. R. App. P. 5); all pleadings, motions, etc., shall be served upon other parties by mail or in person (17 C.F.R. §12.48(b), Fed. R. Civ. P. 5(b)); any party may serve on any other party notice to produce copies of relevant documents (17 C.F.R. §12.63, Fed. R. Civ. P. 34(a)); depositions on written interrogatories may be taken of other parties without order or subpoena, and of non-parties pursuant to order or subpoena (17 C.F.R. §12.64, Fed. R. Civ. P. 31, 33); requests for admissions may be served on any party (17 C.F.R. §12.65, Fed. R. Civ. P. 36(a)); summary disposition is permissible upon motion, answer, and oral argument where there is "no genuine issue of material fact" (17 C.F.R. §12.67, Fed. R. Civ. P. 56); any party may apply to the Administrative Law Judge for a *subpoena ad testificandum* or *duces tecum* (17 C.F.R. §12.74, Fed. R. Civ. P. 45); objections must be timely made and the grounds therefor must be stated (17 C.F.R. §12.80(c), Fed. R. Evid. 103(a)(1); Administrative Law Judges have the power to award costs as well as damages (17 C.F.R. §12.84(c), Fed. R. Civ. P. 54(d)).

pay that amount to the complaining person.[27] Reparation orders of the Commission are expressly, by statute, made enforceable in the United States District Court in the district in which the respondent resides or conducts business and petitioners are entitled, by statute, to recover a reasonable attorney fee in the District Court, to be taxed and collected as part of the cost of the suit.[28] Orders of the Commission are expressly made reviewable on petition of any aggrieved party in the United States Courts of Appeals.[29] Registrants ordered by the Commission to make reparation who fail to do so are automatically prohibited from trading on all contract markets and subjected to suspension of registration.[30]

Section 14 reparation proceedings manifest the dual concerns of Congress to provide a sure and firm damage remedy to persons aggrieved by violations of the CEA and to do so in a manner consistent with the fundamental statutory purpose to bring commodity futures trading and related activities within the exclusive jurisdiction of a single expert agency. Judicial fashioning of an additional private right of action, in the federal courts, for violations of the CEA would be inconsistent with and in derogation of the balance and coherence achieved by Congress in the CEA.

Under section 14(e), Congress has given the Commission responsibility to determine if violations have occurred and "the amount of damage, if any, to which [a complainant] is entitled as a result of [a] violation". The CEA, at section 2(a)(2), 7 U.S.C. §4a(a)(1), requires that members of the Commission possess a degree of expertise in the commodity

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[27] Section 14(e), 7 U.S.C. §18(e).

[28] Section 14(f), 7 U.S.C. §18(f).

[29] Section 14(g), 7 U.S.C. §18(g).

[30] Section 14(h), 7 U.S.C. §18(h).

futures market and has vested the Commission with responsibility to consider the diverse interests of various sectors of that market in carrying out their regulatory function. The expertise of the Commission, its perspective of the overall market and its responsiblity for consideration of the complex interrelationships of the various sectors thereof give the Commission a unique capability for determining if the CEA has been violated and, if so, what damages are to be awarded in reparation proceedings.

Concomitant enactment of the exclusive jurisdiction provision of the CEA, section 2(a)(1), and of section 14 was responsive to concerns such as those expressed in the following testimony:

> "[I]t is extremely important that federal policy regarding commodities futures trading be uniform throughout the United States, *and not be subject to the vagaries of different interpretations by different courts in different jurisdictions*, especially in view of the technical and sophisticated nature of the subject being regulated and the high degree of foreign involvement. (Emphasis added.)[31]

Thus, the CFTC was "created in order to assure that a single expert agency would have the responsiblity for developing a coherent regulatory program . . ."[32] Adherence to the statutory scheme will promote the administrative coherence sought by Congress: It will permit consistent action, by the Commission, in determining whether violations have occurred

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[31] *Review of Commodity Exchange Act and Discussion of Possible Changes: Hearings Before the House Comm. on Agriculture*, 93d Cong., 1st Sess. 121 (1973) (Statement of Reed Clark expressing concern regarding lawsuits against exchanges).

[32] S. Rep. No. 95-850, 95th Cong., 2d Sess. 13, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 2087, 2101.

and, if so, the appropriate amount of damages to be recovered. To depart from the statutory scheme and provide a private judicial remedy would allow litigation to proceed in the district courts of all jurisdictions, thus frustating the expressed congressional intent to keep determination of violations and of damage awards under section 14 within the exclusive jurisdiction of a single expert agency.

C. Constitutionally Required Principles of Statutory Construction Applied to the Language and Structure of the CEA Compel the Conclusion that No Private Right of Action Exists.

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) gave effect to constitutional limitations on the power of the federal judiciary to create by "inference," under federal regulatory statutes, remedies not enacted by Congress. The constitutional significance of *Transamerica* is best seen in the historical context of the judicial activism it lays to rest.

In 1912 A.R. Rigsby, a switchman employed by the Texas and Pacific Railway Company, fell from a boxcar on which he was working and sustained personal injuries. His fall resulted from a defective ladder which violated the Federal Safety Appliance Act, 27 Stat. 531, a statute requiring "secure grab irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars". None of the Federal Safety Appliance Acts expressly conferred a right of action for the death or injury of an employee. Nonetheless, this Court in *Texas & P.R. Co. v. Rigsby*, 241 U.S. 33 (1916), affirmed Rigsby's recovery of damages against his employer. The Court held that:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, *the right to recover the damages from the party in default is implied, according to a doctrine of the common law*. . .[emphasis added, citation omitted]. . .'So, in every case, where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law' [citation omitted]. This is but an application of the maxim, *ubi jus ibi remedium*."[33]

241 U.S. at 39-40.

The *Rigsby* Court, honoring a tort per se theory, unabashedly engaged in lawmaking as it generated a substantive rule of decision: a statutory duty evidences a duty owed to the plaintiff and the breach thereof is actionable.[34] Such judicial lawmaking was hardly shocking in the era in which *Rigsby* was decided, when the rule of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) authorized the federal courts to fashion a federal

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[33] Where there is a right, there is a remedy.

[34] It should be noted that the *Rigsby* Court might have reached the same result, finding an implied private right of action, even under the more rigorous principles of statutory construction that the Court emphasized in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). The statute in *Rigsby* provided that an employee injured by a car in use contrary to the act "shall not be deemed to have assumed the risk." Express removal by the statute of a legal defense to an employee's suit might well render permissible an inference that Congress intended that employees have the right to bring such suits. In *Transamerica* a statutory provision rendering certain contracts void created the inference that Congress intended a right of action to adjudicate the issue of voidness. The constitutional mischief of *Rigsby*, however, is its oft-cited reliance on the common law tort per se theory for implication of a private right of action under a regulatory statute that does not expressly provide such a right.

general common law in diversity cases. Application of time honored common law principles such as *ubi jus ibi remedium* might be expected to carry over into federal question cases, as it did in *Rigsby*, in furtherance of the development of the federal general common law.

In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), however, the Court overruled *Swift v. Tyson*, holding that "[t]here is no federal general common law". 304 U.S. at 78. Moreover, article I, section 1 of the United States Constitution compels application of *Erie's* proscription of judicial lawmaking to federal question as well as to diversity cases. Judicial adherence to the constitutional proscription against substantive judicial lawmaking has, however, been inconsistent in federal question cases even in the years since *Erie* expressly laid to rest the concept of a federal general common law.

For example, in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), the Court applied general common law principles reminiscent of the tort per se rule of *Rigsby* in creating a private right of action under section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a). Having emphasized section 14(a)'s remedial purpose the Court stated as follows:

> "Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in antitrust treble damage litigation, the possiblity of civil damages or injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements . . .
>
> "We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose."

377 U.S. at 432-33.

Borak **perhaps represents the high water mark of judicial activism in the creation of substantive rights of action from regulatory statutes. It is analytically suspect on several grounds. First, the determination of whether private enforcement of section 14(a) is "necessary" as a "supplement to Commission action" is a legislative function that the Constitution places squarely in the Congress. The analogy to the antitrust laws is therefore inappropriate insofar as the right of a private litigant to pursue civil damages under the antitrust laws is a substantive right expressly enacted by Congress[35] and not "provided" by the federal judiciary. Finally, *Borak* confuses the traditional implicit judicial power to fashion remedies to effectuate a substantive right of action enacted by Congress, with unconstitutional judicial usurpation of the congressional prerogative to create the substantive right itself.[36] *Borak* represents, quite plainly, an open invitation to the Judicial Branch to substitute its own judgment for that of Congress as to how the general purpose of a statute might best be effectuated.**

The judicial enthusiam, apparent in *Borak*, for creation of private rights of action under federal regulatory legislation appears to have guided the majority below notwithstanding this Court's most recent decisions that flatly reject the tort per se theory manifest in *Rigsby* and *Borak*. The majority below held as follows:

> "What we have done here, in our view, is to preserve the general concept of a private right of action and

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[35] 15 U.S.C. §15.

[36] *See generally* Maher, *Implied Private Rights of Action and the Federal Securities Laws: A Historical Perspective*, 37 Wash. & Lee L. Rev. 783 (1980).

> to provide for its continuing development, not under the securities laws generally, but under those laws of Congress which are more particularly related to the commodities market. This approach provides greater sensitivity to the specialized concerns of that area of commercial life, appears consistent with Congressional intent and also allows for the development of a private right of action similar to the valuable body of law that has grown under Section 10 of the Securities Exchange Act and Rule 10b-5." (A36)

Under article I, section 1 of the Constitution, the right to "*preserve* . . . a private right of action and to *provide* for its continuing development" is that of Congress alone. The constitutional truth of this principle, and the error of the majority below, are plain in the light of this Court's recent decisions articulating the factors that justify, only under circumstances not present here, judicial inference of a private right of action that has been, in the first instance, implicitly created by the Congress.

In *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), the Court considered the question of whether there is a private right of action under section 206 of the Investment Advisers Act of 1940.[37] Section 206, as does CEA section 4b, broadly proscribes fraudulent practices: It is fair to say that section 206 is the counterpart in its statutory scheme to section 4b of the CEA. In reaching the conclusion that no private right of action is implied under section 206, the Court applied the canon of statutory construction previously re-emphasized in *Touche Ross & Co. v. Redington*,

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[37] 15 U.S.C. §80b-6.

442 U.S. 560, 568 (1979): "As with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself". The Court relied heavily upon the express language and structure of the Investment Advisers Act, similar in many key respects to the language and structure of the CEA, in concluding that the statute does not implicitly confer a private right of action:

> "[Section] 206 simply proscribes certain conduct, and does not in terms create or alter any civil liabilities. If monetary liability to a private plaintiff is to be found it must be read into the Act. *Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it*. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' [citations omitted] Congress expressly provided both judicial and administrative means for enforcing compliance with §206. First, under §217, 15 U.S.C. §80b-17, willful violations of the Act are criminal offenses, punishable by fine or imprisonment, or both. Second, §209 authorizes the Commission to bring civil actions in federal courts to enjoin compliance with the Act, including, of course, §206. Third, the Commission is authorized by §203 to impose various administrative sanctions on persons who violate the Act, including §206. *In view of these express provisions for enforcing the duties imposed by §206, it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action'.*"

444 U.S. at 19-20 [emphasis added].

The language and structure of the CEA make it clear that the same considerations that precluded judicial inference of a

private right of action under section 206 of the Investment Advisers Act in *Transamerica* compel the same result in this case. As in *Transamerica*, the statute at issue here provides for broad and varied means of judicial and administrative enforcement of its proscriptive provisions: "A court must be chary of reading others into it."

The reparation procedure provided by section 14 of the CEA renders this case even more compelling than *Transamerica* for denial of an additional private judicial remedy. In construing the CEA there is no reason for a court to speculate whether Congress intended that persons aggrieved by violations of the Act be entitled to recover damages. Plainly, Congress did so intend and expressly provided a forum and a detailed procedure by which the remedy may be pursued. Morever, the express provisions of section 14 make it clear that Congress considered the role to be played by the federal courts in the recovery of damages and expressly limited that role to enforcement and review of administrative reparation awards. By so providing, Congress implicitly rejected and foreclosed the right here asserted by the Currans to proceed with private damage claims in the federal courts in the first instance:[38] "Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Transamerica*, *supra*, at 21; *Touche Ross*, *supra*, at 572.

The majority below erred in its disregard of the fundamental canons of statutory construction emphasized in *Transamerica*. It reverted, in essence, to the discredited tort per se analysis of *Rigsby* and *Borak*. The majority, stressing the remedial purposes of the CEA and perceiving a congressional

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[38] *Compare* Sections 308, 309, Packers and Stockyards Act, 7 U.S.C. §§209, 210 (providing agency reparations proceedings analogous to CEA Section 14, while *expressly* providing an alternative judicial right of action).

intent to protect investors, concluded that a private judicial right of action would advance the congressional purpose and proceeded to fashion that substantive right. *Touche Ross*, however, expressly rejects such analysis:

> "The question of the existence of a statutory cause of action is, of course, one of statutory construction . . . [*The*] *argument in favor of implication of a private right of action based on tort principles, therefore, is entirely misplaced* . . . As we recently have emphasized, 'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person' . . . Instead, our task is limited solely to determining whether Congress intended to create the private right of action asserted . . . And as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself." [Citations omitted.]

422 U.S. at 568.

Merrill Lynch submits that the express language and the structure of the CEA are conclusive evidence that Congress intended that no private judicial right of action exist under the CEA. All of the canons of statutory construction emphasized in *Transamerica* and *Touche Ross* and recently reiterated in *Middlesex County Sewage Auth. v. National Sea Clammers Assn.*, ____U.S.____, 49 U.S.L.W. 4783 (June 25, 1981), *Northwest Airlines, Inc. v. Transport Workers Union*, 49 U.S.L.W. 4383 (April 20, 1981) and *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), when applied to the CEA, refute the existence of a private right of action. Only in cases where the intent of Congress to grant or to deny a private right of action is ambiguous because

of the language and structure of a statute[39] does the need arise to pursue other sources of potential illumination of congressional intent, such as legislative history or the circumstances surrounding enactment of the legislation. In cases such as the one at bar, where the congressional intent not to confer a private judicial right of action is manifest within the language and structure of the CEA itself, the Court's inquiry is at an end.[40]

II.

Application of the *Cort v. Ash* Analysis Compels the Conclusion that There is No Private Right of Action Under Section 4b of the CEA.

In *Cort v. Ash*, 422 U.S. 66 (1975) the Court listed four factors thought to be relevant to a determination whether a private right of action should be inferred from a federal statute.[41] Cases subsequent to *Cort* have explained that the

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[39] *See, e.g., Transamerica* (ambiguity created by one provision [section 215, 15 U.S.C. §80b-15] declaring certain contracts void, within a statute not expressly providing a right to adjudicate the issue of voidness).

[40] In *Kissinger, supra*, the Court concluded that no private right of action existed under the statutes in question purely by reference to the language and structure of the statutes. The discussion of legislative history by the Court simply "confirms" the Court's conclusion that the statutes' silence as to private rights of action is purposeful. 445 U.S. at 149.

[41] "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S. at 78 (citations omitted).

ultimate issue is whether Congress intended to create a private right of action[42] but the four factors specified in *Cort* retain significance as the criteria through which this intent can be discerned.[43]

As noted in the foregoing sections of this brief, Merrill Lynch contends that the express language and structure of the CEA are conclusive as to the congressional intent that no private right of action exists under section 4b. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

As also noted in *Transamerica, supra*, at 20, even settled rules of statutory construction could yield to "*persuasive evidence* of a contrary legislative intent" [emphasis added]. The evidence of intent that is developed in this case by pursuit of the four *Cort* inquiries, however, weighs against the implication of a private right of action and simply confirms the conclusion mandated by the language and structure of the CEA.

A. Section 4b Was Not Enacted for the Especial Benefit of Any Class.

The expressed purpose of the CEA is to maintain an orderly futures market in aid of a stable, unobstructed flow of interstate commerce in commodities. Section 3 of the CEA, 7 U.S.C. §5 states Congress' purpose as follows:

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[42] *See California v. Sierra Club*, ___ U.S. ___, 49 U.S.L.W. 4441 (April 28, 1981); *Universities Research Assn. v. Coutu*, ___ U.S. ___, 49 U.S.L.W. 4354 (April 6, 1981); *Transamerica Mortgage Advisors v. Lewis, supra*, at 23-24; *Touche Ross & Co. v. Redington, supra*, at 568, 575-76.

[43] *Davis v. Passman*, 442 U.S. 228, 241 (1979); *Transamerica Mortgage Advisors v. Lewis, supra*, at 27 (White, J., dissenting).

"Transactions in commodity involving the sale thereof for future delivery as commonly conducted on boards of trade and known as 'futures' are affected with a national public interest; such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodity and the products and byproducts thereof in interstate commerce; the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of commodity and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce; such transactions are utilized by shippers, dealers, millers, and others engaged in handling commodity and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodity and products and byproducts thereof in interestsate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

It is plain that the CEA does not focus its protection on any discrete group: it was not enacted for the "*especial* benefit" of

any "class" of persons. Section 3 makes reference to several groups centrally involved in commerce in commodities. It speaks of shippers, dealers, millers and others engaged in handling commodities. It speaks of the involvement of the "public generally" in futures transactions. It refers to the harm caused consumers and producers by abusive speculation and manipulation. It characterizes the sudden or unreasonable price fluctuations generated by those abuses in the market as "an obstruction to and a burden upon interstate commerce". It deems regulation to be "imperative for the protection of . . . commerce and the national public interest".

Similarly broad are the anti-fraud provisions of section 4b which proscribe, in essence, cheating or defrauding by "any person," of any "other person" in connection with commodity futures transactions. There is no effort by Congress to focus the benefit of outlawing fraud in commodity futures transactions on any single group. Section 4b was enacted simply to prevent conduct that section 3 characterized as an "obstruction" to commerce and a detriment to the national public interest.

The Court's decision in *California v. Sierra Club*, ____U.S.____, 49 U.S.L.W. 4441 (April 28, 1981) is dispositive. In *Sierra Club* the plaintiffs sought injunctive relief under section 10 of the Rivers and Harbors Appropriation Act of 1899 (the "RHAA"), 33 U.S.C. §403, which prohibits "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States". The RHAA does not expressly provide a private right of action.

The District Court, however, and the Court of Appeals in *Sierra Club* both recognized an implied right of action. In reversing, this Court held as follows:

> "It was apparently reasoned [by the Court of Appeals] that since Congress enacted a statute that forbids such obstructions in navigable waters, any person who would be 'especially harmed' by an unauthorized obstruction was an especial beneficiary of the Act. But such a definition of 'especial' beneficiary makes this factor meaningless . . . *The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries.*"

____U.S. at____, 49 U.S.L.W. at 4443 [emphasis added].

In *Sierra Club*, as in *Transamerica*, the language of the statute provided the necessary guidance:

> "In ascertaining this intent, the first consideration is the language of the Act. Here, the statute states no more than a general proscription of certain activities; *it does not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further. Such language does not indicate an intent to provide for private rights of action.*"

Id. [emphasis added].

There is no reason to depart in this case from the sound reasoning of *Sierra Club*. Both the RHAA and the CEA proscribe activities deemed detrimental to commerce. The Congressional concern manifest in both statutes is "not with private rights but with the federal government's ability to respond to obstructions" to commerce. *Sierra Club*, at ____, 49 U.S.L.W. at 4443.

The CEA demonstrates Congress' awareness of the existence of numerous identifiable classes of persons involved in interstate commerce in commodities. Hedgers, speculators, shippers, dealers, millers, commission merchants, exchanges,

floor traders and others all serve essential functions in a field of commerce recognized to be in the national public interest. Despite this recognition of various groups within the industry, Congress chose to define its purpose in Section 3, and to proscribe fraudulent conduct in section 4b, in only the broadest terms. There is no "unmistakable focus" on protecting speculators, the class to which the Currans belong. Absent such "unmistakable focus" an intent to create a private right of action cannot be inferred. *Sierra Club, supra.*

B. Explicit and Implicit Indications of Legislative Intent Show That Congress Did Not Intend to Create a Private Right of Action Under Section 4b.

Transamerica and *Touche Ross* recognize that the heart of the *Cort* analysis is the search for an affirmative intent on the part of Congress to create the private right of action asserted. As noted above, the search for an affirmative congressional intent to create the right of action is not simply a canon of statutory construction. Rather, it is required by article I, section 1 of the Constitution and the doctrine of the separation of powers. The federal judiciary has no power to "imply" or otherwise engraft private causes of action within express statutory schemes. The Judicial Branch may constitutionally only recognize or infer rights of action affirmatively created by Congress, whether that affirmative legislative intent is manifested expressly in statutory language or by implication in statutory structure, context or legislative history. *Sierra Club, supra,* at ____, 49 U.S.L.W. at 4444; *Northwest Airlines, supra,* at ____, 49 U.S.L.W. at 4388-89; *Cannon v. University of Chicago,* 441 U.S. 677, 730-49 (1979) (Powell, J., dissenting); *Rivers v. Rosenthal & Co.,* 634 F.2d 774, 781-82, n.11 (5th Cir. 1980). *See also Transamerica, supra,* at 25 (Powell, J., concurring) (indicating that the approach

taken in *Transamerica* was consistent with his dissent in *Cannon*).

Moreover, where, as here, the statute fails expressly to provide a private judicial right of action while expressly providing for other remedies, an additional right of action cannot be inferred by the courts absent "persuasive evidence of a contrary legislative intent". *Transamerica, supra*, at 20. *See also Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. at 108 (absent a clearly expressed legislative intention to the contrary, the statutory language must ordinarily be regarded as conclusive).

The Court has recently applied this principle with great emphasis. In *Northwest Airlines, supra*, at ____, 49 U.S.L.W. at 4389 the Court held that "[t]he presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." The CEA's enforcement scheme is at least as comprehensive as those under the Equal Pay Act of 1963, 29 U.S.C. §206(d) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000a, *et seq.*, which the Court deemed sufficient to create a "*presumption*" against inference of an additional private judicial remedy. In *National Sea Clammers, supra*, the Court gave similar effect to the comprehensive enforcement schemes of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§1251, *et seq.* and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§1401, *et seq.*:

> "In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA . . . In the absence of *strong indicia* of a contrary congressional intent, we are *compelled* to

> conclude that Congress provided precisely the remedies it considered appropriate."

____U.S. at ____, 49 U.S.L.W. at 4787 [emphasis added].

In *Rivers, supra*, Judge Reavley quotes the observation of Chief Justice Marshall that "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived." 634 F.2d at 792. This Court is now in possession of the fruits of the labor of many able minds that have scoured the many hundreds of pages of legislative history of the CEA and all of the amendments thereto in search of some indication as to what Congress intended (if, indeed, it had any intent whatever) with respect to the creation of a private right of action. The analyses of that legislative history contained in the opinions of Judges Friendly and Mansfield in *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), and of Judge Reavley in *Rivers* may fairly be characterized as exhaustive. The briefs filed with this Court in the appeals from *Leist* (Docket Nos. 80-757, 895, 936), including those of distinguished *amici curiae*, offer further discussion of the debates, testimony and reports contained within that legislative history. All of this scholarly exposition, including (perhaps especially) that offered by those arguing in favor of the private right of action, should lead the Court to the inescapable conclusion that there simply is *no clearly expressed, persuasive evidence*, within the legislative history, sufficient to rebut the presumption that Congress did not intend to create a private right of action under section 4b.

The references to the legislative history relied upon by the majority below are insufficient to establish an affirmative intent on the part of Congress to create the private right of action here asserted. The majority opinion refers to the remarks of Representative Poage[44] as support for the proposition that

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[44] 119 Cong. Rec. 41333 (1973).

"Congress recognized that the 'courts had implied a private remedy for individual litigants in the Commodity Exchange Act.' " (A31) Representative Poage was, in fact, citing such private litigation as a threat to the self-regulatory activities of exchanges and as "solid reason for [the exchanges] shrinking the protection given the customer and the public through self-regulation".[45] In context, Representative Poage was citing private litigation as a discordant note in the regulatory scheme and as further reason for "Congress to act, and act expeditiously through meaningful, thoughtful change that is well reasoned and sure"[46] to provide the comprehensive, coherent and balanced regulatory scheme embodied in the 1974 Amendments.

Similarly misplaced is the majority's reliance (A31, n. 27) upon comments made during Senate hearings on the 1974 Amendments.[47] The testimony cited includes that of Professor Schotland, who argued emphatically for enactment of the private civil damage remedy contained in the Hart Bill.[48] Professor Schotland also argued forcefully *against* the broad private reparation proceedings ultimately enacted as section 14. The thrust of Professor Schotland's remarks was that adjudication of private damage claims should be in the courts and not in the CFTC. He argued to the Congress that "[i]f you do choose to retain such virtually unprecedented responsiblity and burden [section 14 reparation proceedings] in this regulatory body, there should be explicit language in the

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[45] *Id.*

[46] *Id.*

[47] *Commodities Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess. 205, 737 (1974).

[48] S. 2837, 93d Cong. 1st Sess., §505(a), 119 Cong. Rec. 42688 (1973).

statute that Federal and State courts are still open if a complainant prefers to go to trial there."[49]

Indeed, there were three bills introduced in the 93d Congress that would expressly have provided a private right of action for damages in the federal courts for redress of violations of the CEA.[50] The Hart Bill, for example, would have provided a right of action for restitution in the federal district courts for a non-willful violation of "any provision of this Act or regulation or order issued thereunder," with a treble damage remedy for willfull violations. None of the three bills were enacted. As the 1974 Amendments make clear, Congress acted contrary to the recommendations of Professor Schotland, deciding in favor of granting jurisdiction over private damage claims to the CFTC under section 14 and against an alternative private remedy in the federal courts.

The majority below also relied on the remark of Senator Clark that "§201 of [H.R. 13113] may prohibit all court actions"[51] as evidence that the proviso to section 2(a)(1), 7 U.S.C. §2, was added to preserve a private damages action in the federal courts. The proviso states that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State". A far more compelling explanation for the addition of the proviso, however, is contained in the statements of Representative Rodino, Chair-

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[49] *Commodities Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess. 737 (1974) (statement of Prof. Schotland).

[50] S. 2837 (Hart Bill), 93d Cong., 1st Sess., §505(a)-(b), 119 Cong. Rec. 42688 (1973); H.R. 11195 (Smith Bill), 93d Cong., 1st Sess. §17 (1973) (treble damages); S. 2578 (McGovern Bill), 93d Cong., 1st Sess., Part I, §20, 119 Cong. Rec. 33947-48 (1973) (treble damages).

[51] *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess., 205 (1974) (statement of Sen. Clark).

man of the House Committee on the Judiciary[52] and the testimony of Deputy Assistant Attorney General Keith Clearwaters. Both witnesses directly attacked the exclusive jurisdiction provision of section 2, to which the proviso was eventually added,[53] expressing the concern that the all-encompassing language of section 2, allocating to the CFTC exclusive jurisdiction over the futures trade, was so broad that it even "could be interpreted to deprive Federal courts of their jurisdiction under the antitrust laws and to deprive Federal and State courts of jurisdiction to enforce contract and commercial law rights" in the futures areas.[54] The Rodino-Clearwaters statements, unlike the passing remark of Senator Clark, are derived from extensive and pointed attacks on the very section that the proviso later served to amend and are directed to the question of jurisdiction as opposed to a single cause of action. As a result, they offer a more persuasive explanation for the addition of the proviso. *Rivers, supra*, at 787. The remark of Senator Clark, a passing reference by a single legislator, is a slim reed upon which to base a finding that Congress approved a private right of action. *Consumer Products Safety Commission v. GTE Sylvania, Inc., supra*, at 118; *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 31-32 (1977); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *Leist, supra*, at 352 (Mansfield, J., dissenting). In view of the lengthy and authoritative House and Senate Reports on the 1974 Amendments, both of which are silent as to the existence of any private judicial right of action, the remarks of Senator Clark and their bearing on the construction of section 2(a)(1) as the basis for a private judicial right of action are entitled to little weight.

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[52] *Id.* at 259-260.

[53] *Id.* at 663-64.

[54] *Id.* at 663.

Further, in *Touche Ross, supra*, at 577, the Court declared that reliance upon the general jurisdictional provision of a statute in attempting to infer a private right of action is misplaced and that the source of a plaintiff's rights "must be found, if at all, in the substantive provisions" of the Act sought to be enforced. *See also National Sea Clammers, supra*, at ____; 49 U.S.L.W. at 4787-88. There is, of course, no substantive provision in the CEA for a private judicial right of action.

The majority's attenuated reliance upon the proviso of section 2(a)(1) as the source of a private right of action disregards the plain fact that when Congress wishes to provide a private damages remedy it knows how to do so and does so expressly. *Transamerica, supra*, at 21; *Touche Ross, supra*, at 572.

Reliance by the majority below upon the remarks of Senator Talmadge is also misplaced. The Senator's statement that under the statutory reparation proceedings "the entire *appeal* process and the right of *final* determination by the courts are expressly preserved" (emphasis added), plainly does not support an inference that original *trial* jurisdiction over private damage claims also exists.

The authoritative Senate Report on the 1978 Amendments makes it plain that Congress was aware that no private right of action was included within the regulatory scheme following the 1974 Amendments. The Senate Report includes a comprehensive list of public and private remedies provided customers under the CEA and conspicuously fails to include any reference to a private judicial remedy:

> "The Commodity Exchange Act provides many customer protections and remedies. The Act directs the Commission to promulgate and administer a regulatory program that includes registration of commodity professionals, segregation of customers'

> funds by futures commission merchants, establishment of dual trading guidelines, creation of a procedure for the adjudication of reparation claims, monitoring exchange arbitration procedures and disciplinary actions, and licensing of industry self-regulatory futures associations. Moreover, customers are afforded protection through the Commission's power to sue directly for injunctive relief and to invoke a full range of administrative remedies where appropriate to curb unlawful behavior."[55]

While the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, such views are entitled to significant weight, particularly so when the intent of the enacting Congress is obscure. *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

The 1978 Amendments are also of significance insofar as they provided for the *parens patriae* actions by state attorneys general to bring suit, on behalf of residents of their respective states, to enjoin violations of the CEA.[56] The district courts of the United States are expressly granted jurisdiction over such actions, brought by state attorneys general, "to enforce any liability or duty created by this chapter or any rule, regulation, or order of the Commission thereunder, or to obtain damages or other relief with respect thereto". Section 6d also requires the state, immediately upon instituting such a suit, to notify the Commission and provide the Commission with a copy of the Complaint. The Commission is also granted rights to intervene in the suit, be heard on all matters, and file an appeal.

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[55] S. Rep. No. 95-850, 95th Cong., 2d Sess. 12-13, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 2087, 2100-01.

[56] Section 6d, 7 U.S.C. §13a-2.

The significance of section 6d in the context of the instant suit is apparent. The 95th Congress *expressly* authorized *parens patriae* actions for injunctive relief and damages; it *expressly* provided for jurisdiction in the federal district courts; it carefully provided for participation by the CFTC in such suits to preserve the Commission's ability to provide cohesiveness and consistency in the administration of the Act. It is simply illogical to infer that Congress enacted section 6d with such specificity and with such retention of control within the CFTC while at the same time *implicitly* granting a private right of action for individuals in the federal courts, free of any Commission restraint or participation.

The majority below also based its inference of a private right of action upon its finding that "Congress was aware of the fact that the federal courts had implied the existence of a private right of action under the CEA" prior to the 1974 Amendments and upon the rule of statutory construction that Congress is presumed to be aware of existing constructions of statutes and does not intend to overrule them if the provision is reenacted in substantially the same form. (A31, n.27) The Court of Appeals' reasoning is incorrect. First, the majority's reference to holdings of "the federal courts" is overbroad. The United States Supreme Court had not spoken on the subject. In fact, only lower federal courts in a very few jurisdictions had considered the issue. Second, there is no evidence that the Congress as a whole, in considering the 1974 Amendments, was aware of these lower federal court decisions. As noted above, in the voluminous legislative history of the 1974 Amendments there are only a few isolated and fleeting references to a private right of action and some of those remarks, such as those of Representative Poage quoted above, were critical of the effect such actions would have on the regulatory scheme. Finally, the canon of statutory construction relied upon applies only if the provision is reenacted in substantially the same form. The CEA can hardly be said to

have retained substantially the same form following the 1974 Amendments. It was, in fact, "completely overhauled",[57] providing, for the first time, pervasive and meticulously detailed regulation by a new agency, the CFTC, created for just that purpose. Most significantly, it contained a new provision, section 14, which provided for administrative reparation proceedings that totally obviate the need for and undermine any basis for inferring the existence of a private right of action. As the Court stated in *Rivers*, *supra*, at 784, "[s]o significant a transfiguration of the extant statutory framework is, itself, a wholesale obliteration of the prior status quo and sufficient reason for declining to adopt [the analytical approach grounded in the reenactment doctrine]." *See also Leist*, *supra*, at 339-353 (Mansfield, J., dissenting).

Judge Reavley, writing for the Fifth Circuit in *Rivers*, aptly summarized as follows his Court's attempt to glean, from the background and legislative history of the CEA, guidance on the private right of action issue:

> "The foregoing analysis of the language, structure and legislative history of the 1974 version of the CEA and its 1978 amendments obviously has yielded a result that might be described as emphatically equivocal. Although some individual passages or aspects of the Act appear to give some insight, these inferences frequently conflict with those from other passages or, upon closer examination, their apparent persuasiveness dims or vanishes. Chief Justice Marshall once observed that '[w]here the mind labors to discover the design of the legislature, it seizes upon everything from which aid can be derived' . . . *United States v. Fisher*, 2 Cranch. 358, 386 (1805) . . . After our analysis of the legislative

[57] H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 1 (1974).

> material and decisions of other courts on this question, we might add that in this metaphysical pursuit of prescience the mind often snatches at shadows and mirages in its attempt to discern evidence of such Congressional design — a singularly inappropriate base upon which to predicate an implied private cause of action.
>
> "The net result of our study and deliberations in this case is the determination that the language and legislative history of the CEA and CFTCA, dissected by all of the varied and even conflicting canons of construction, simply do not provide any clear indication of congressional intent either to approve or deny an implied right of action. In such a case . . . given the absence of clear evidence of the requisite affirmative congressional intent to create or provide such a cause of action — we are bound to refuse plaintiff's suit."

634 F.2d at 792.

C. Implication of a Private Right of Action is Inconsistent with the Underlying Purposes of the Legislative Scheme.

The underlying purpose of the 1974 Amendments was to bring regulation of commodity futures trading and all related activities within the exclusive jurisdiction and comprehensive regulatory purview of a single agency, the CFTC, created for that express purpose.[58] The Commission was given broad responsiblity for regulation of all aspects of the markets and plenary powers to enforce compliance with the statutory pro-

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[58] Section 2(a)(1), 7 U.S.C. §2; S. Rep. No. 95-850, 95th Cong., 2d Sess., *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 2087.

visions of the CEA and the rules, regulations and orders of the Commission issued pursuant thereto.

In drafting and considering the 1974 Amendments, Congress heard testimony from and balanced the interests of all segments of the commodity futures industry. For example, the statutory power given the Commission in section 6(b), 7 U.S.C. §9, to fine persons found to have violated the CEA or rules, regulations or orders of the Commission, up to $100,000 for each violation is tempered by the admonition of section 6(d), 7 U.S.C. §9a, that the Commission shall consider "the appropriateness of such penalty to the size of the business of the person charged, [and] the extent of such person's ability to continue in business . . ."

In granting exclusive jurisdiction to the CFTC and giving that agency comprehensive regulatory authority over the commodity futures market, Congress charged the Commission with responsibility for the effectiveness of the overall market. The solicitude manifest in section 6(d) for the viability of participants in that market reveals a very careful balancing by the Congress of the interests, needs and responsibilities of the diverse elements that comprise the entire commodity futures industry. This careful balancing by Congress is demonstrated in other provisions of the CEA which show that an implied right of action is inconsistent with the statutory scheme.

Congress' awareness of the threat to its unified regulatory scheme posed by private action suits is manifest in the provisions of section 6d, 7 U.S.C. §13a-2. That section preserves, as noted above, a degree of commission control over *parens patriae* actions by requiring that the Commission be advised of the filing of such actions, be provided with a copy of the Complaint, and have a right to intervene in such suits and be heard on all matters arising therein. Again in evidence is the balancing by the Congress of competing interests: Congress

expressly provides for private damage actions, while Commission participation therein meets the perceived necessity to maintain an element of perspective and responsiblity for the overall well-being of the market.

The very carefully circumscribed jurisdiction the CEA expressly confers upon the federal courts[59] is another essential element of its balance. By enactment of the provisions for resolution of customer disputes, sections 5a(11) and 14, 7 U.S.C. §§7a(11), 18, Congress chose *not* to impose upon registered persons such as Merrill Lynch the substantial expense and disruptive impact of federal litigation of private damage claims, *see Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-43 (1975), the burden of which would of necessity be passed on to the overall market in the form of higher commissions and diminished efficiency. Judicial creation of a right to litigate in federal court all alleged breaches of duties claimed to exist under section 4b would drastically alter the balance inherent in the legislative scheme.

By enacting the 1974 Amendments Congress sought to achieve at least three concomitant objectives: (1) to promote the benefits to the national economy and public interest that an orderly futures market provides; (2) to provide protection and redress for persons who participate in and rely on those markets; (3) to insure the viability of and provide regulatory protection to the FCMs, commodity trading advisors, commodity pool operators, floor brokers and contract markets that comprise the industry itself. The CEA expresses the

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[59] Section 6b, 7 U.S.C. §13a (jurisdiction to enforce orders of the CFTC); Section 6c, 7 U.S.C. §13a-1 (jurisdiction in mandamus and injunctive actions by the Commission); Section 6d, 7 U.S.C. §13a-2 (jurisdiction in *parens patriae* suits); Section 6(b), 7 U.S.C. §15 (enforcement of subpoena powers); Sections 14(f), (g), 7 U.S.C. §§18(f), (g) (enforcement and review of reparation awards); Section 9, 7 U.S.C. §13 (and 18 U.S.C. §3231) (jurisdiction in criminal actions).

wisdom of Congress as to how those at times competing interests are best served. Important, then, is the admonition of the Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978): "[w]here Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other". The CEA's silence on private rights of action in the federal courts is purposeful. Judicial creation of a private right of action would disrupt the balance achieved by Congress and thwart the purposes of the Act. *See Northwest Airlines, supra*, at ____; 49 U.S.L.W. at 4389.

D. The State-Federal Concern Element of *Cort* Does Not Support Inference of a Private Right of Action Under Section 4b.

The fourth consideration set forth in *Cort* is whether the asserted cause of action is one relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law. Under the circumstances of this case, with specific reference to the statutory framework of the CEA and the section 14 reparation proceedings, that consideration becomes inapplicable.

Cort considered the question of whether a federal criminal statute, prohibiting corporations from making contributions or expenditures in connection with federal elections, gives rise to a private right of action by a shareholder against the corporation in the event of such illegal expenditures. The Court noted that regulation of the internal affairs of corporations was an area traditionally relegated to state law, and the laws of the various states regarding corporate contributions in connection with state elections put shareholders on notice as to how their funds may permissibly be used. The Court was

"necessarily reluctant to imply a federal right to recover funds used in violation of a federal statute where the laws governing the corporation may put a shareholder on notice that there may be no such recovery". 422 U.S. at 84-85.

The situation presented here is fundamentally different yet there is an equally compelling reason to reject the asserted right of action in the federal courts. With the very limited exception of the enforcement of contractual commercial rights inhering in contracts for the future delivery of commodities, which the CEA does not purport to regulate and which remain within the province of state law,[60] the CEA is preemptive of state law.[61] The CEA manifestly makes regulation of commodity futures trading a federal concern. However, in so doing it is similarly preemptive of any implied private right of action in the federal courts. By expressly providing the means for redress, before the CFTC, for losses sustained as a result of violations of the Act, it forecloses the basis for any inferred right of action. *Cort* declined to infer a private federal right of action that would contravene the fair expectations that shareholders could derive from controlling state law. The same deference should here be accorded to expectations generated by the express provisions of the CEA.

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[60] Section 2(a)(1), 7 U.S.C. §2.

[61] As noted in Merrill Lynch's petition for certiorari, at 13, fraud actions such as this one have been a traditional subject of state court litigation. However, state court jurisdiction, except over contract and commercial rights, has been preempted by the "exclusive jurisdiction" of the CFTC. Arbitration under section 5a(11), 7 U.S.C. §7a(11) and reparation proceedings under section 14, 7 U.S.C. §18, are the exclusive means under the CEA for resolution of customer claims.

CONCLUSION

For the foregoing reasons, Petitioner Merrill Lynch respectfully requests that the Court vacate the Judgment of the Court of Appeals with respect to the existence of a private right of action under CEA section 4b.

Respectfully submitted,

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CODE OF FEDERAL REGULATIONS (17 C.F.R.)
COMMODITY FUTURES TRADING COMMISSION
RULES RELATING TO REPARATION PROCEEDINGS

PART 12—RULES RELATING TO REPARATION PROCEEDINGS

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AUTHORITY: (Pub. L. 93-463, Sec. 101(a)(3), 88 Stat. 1391 (7 U.S.C. 4j); Sec. 106, 88 Stat. 1393 (7 U.S.C. 18); 31 U.S.C. 483a).

SOURCE: 41 FR 3999, Jan. 27, 1976, unless otherwise noted.

Subpart A—General Information

§ 12.1 Scope and applicability of rules of practice relating to reparation proceedings.

These rules of practice are applicable to reparation proceedings pursuant to section 14 of the Commodity Exchange Act, as amended, 7 U.S.C. 18. The rules in this part shall be construed liberally so as to secure the just, speedy and inexpensive determination of the issues presented with full protection for the rights of all parties to the proceedings envisioned by the Commodity Exchange Act, as amended.

§ 12.2 Applicability of other rules of practice promulgated under the Commodity Futures Trading Commission Act.

Unless specifically made applicable, other Rules of Practice promulgated under the Commodity Exchange Act, as amended, shall not apply to reparation proceedings.

§ 12.3 Definitions.

For purposes of this part:

(a) "Act" means the Commodity Exchange Act, as amended, 7 U.S.C. 1, et seq.;

(b) "Administrative Law Judge" means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105;

(c) "Administrative Procedure Act" means those provisions of the Administrative Procedure Act, as codified, which are contained in 5 U.S.C. 551 through 559.

(d) "Commission" means the Commodity Futures Trading Commission;

(e) "Complainant" means a person who has applied to the Commission seeking a reparation award pursuant to Section 14 of the Act, 7 U.S.C. 18;

(f) "Complaint" means any document initiating a reparation proceeding pursuant to section 14(a) of the Act, 7 U.S.C. 18(a), whether designated a complaint or petition or otherwise;

(g) "Division of Enforcement" means that office in the Commission which, among other things, prosecutes in accordance with the Commission's rules of practice contained in Part 10 of this chapter;

(h) "Hearing" means that part of a proceeding which involves the submission of evidence, either by oral presentation or written submission;

(i) "Hearing Clerk" means that member of the Commission's staff designated as such in the Commission's Office of Hearings and Appeals;

(j) "Order" means the whole or any part of a final procedural or substantive disposition of a reparation proceeding by the Commission or by the Presiding Officer;

(k) "Party" includes a complainant, respondent and any other person or agency named or admitted as a party to a reparation proceeding;

(l) "Person" includes an individual, partnership, corporation, association, exchange or other entity or organization;

(m) "Petition" means any document initiating a reparation proceeding pursuant to section 14(a) of the Act, 7 U.S.C. 18(a), whether designated a petition or complaint or otherwise;

(n) "Pleading" means the complaint, the answer to the complaint, any supplement or amendment thereto, and any reply that may be permitted to

any answer, supplement or amendment;

(o) "Presiding Officer" means (1) an Administrative Law Judge in all matters where the amount of damages claimed exceeds $2,500 ($5,000 where the complaint is filed with the Commission on or after October 1, 1978) and all cases where the amount of damages claimed is less than $2,500 ($5,000 where the complaint is filed with the Commission on or after October 1, 1978) but where the Commission has determined that a hearing is necessary; and (2) a member of the Commission, an Administrative Law Judge, a Hearing Officer, or such other Commission employee as may be designated by the Commission to conduct the proceeding in all other matters where the amount of damages claimed in the complaint is less than $2,500 ($5,000 where the complaint is filed with the Commission on or after October 1, 1978);

(p) "Proceeding" includes any reparation proceeding and any proceeding conducted pursuant to the rules of practice set forth in Part 10 of this chapter;

(q) "Registrant" means any person who is registered or required to be registered under section 4d, 4e, 4k or 4m of the Commodity Exchange Act, as amended, as a futures commission merchant, floor broker, person associated with a futures commission merchant or agents thereof, commodity trading advisor or commodity pool operator;

(r) "Respondent" means any person against whom a complainant seeks a reparation award pursuant to Section 14 of the Act, 7 U.S.C. 18;

(s) "Reparation award" refers to the amount of damages a respondent may be ordered to pay as provided in section 14(e) of the Act, 7 U.S.C. 18(e);

(t) "Reparation proceeding" means a proceeding pursuant to which a complainant seeks a reparation award against one or more respondents in accordance with section 14 of the Act, 7 U.S.C. 18.

(Secs. 2a(11), 8a(5) and 14 of the Commodity Exchange Act, 7 U.S.C. 4a(j), 12a(5) and 18, as amended by Pub. L. 95-405, sec. 21, 92 Stat. 875-6)

[41 FR 4000, Jan. 27, 1976, as amended at 44 FR 1202" Mar. 5, 1979]

§ 12.4 Business address; hours.

The principal office of the Commission is located at 1007 21st Street NW., Washington, D.C., and its mailing address is 2033 K Street NW., Washington, D.C. 20581, telephone: (202) 254-7424. It is open each day, except Saturdays, Sundays and legal public holidays from 8:15 a.m. to at least 4:45 p.m., eastern standard time or eastern daylight savings time, whichever is currently in effect in Washington, D.C. If Commission personnel are present in the offices after 4:45 p.m., they may, at their discretion, accept documents for filing and serve the public in other matters within the scope of this Part. Legal holidays include New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other legal holidays recognized by the Federal Government.

[41 FR 3999, Jan. 27, 1976, as amended at 41 FR 28260, July 9, 1976]

§ 12.5 Suspension, amendment, revocation and waiver of rules.

(a) These rules may, from time to time be suspended, amended or revoked in whole or in part. Notice of such action will be published in the FEDERAL REGISTER.

(b) In the interest of expediting decision or to prevent undue hardship on any party or for other good cause the Commission may order the adoption

of expedited procedure: and may waive any rule in Subparts D through H of this part in a particular case and may order proceedings in accordance with its direction upon a determination that no party will be prejudiced and that the ends of justice will be served. Reasonable notice shall be given to all parties of any action taken pursuant to this provision.

(c) The Presiding Officer, to expedite decision or to prevent undue hardship on any party may waive any rule in Subparts D through G of this part, when neither party is prejudiced thereby. Reasonable notice shall be given all parties of any action taken pursuant to this provision.

§ 12.6 Computation of time.

In computing any period of time prescribed by these rules or allowed by the Commission, or the Presiding Officer, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. Intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation only when the period of time prescribed or allowed is less than seven (7) days.

§ 12.7 Changes of time permitted for filing.

Except as otherwise provided by law or by these rules, for good cause shown, the Commission, or the Presiding Officer before whom a matter is then pending, on their own motion or the motion of a party, may at any time extend or shorten the time limit prescribed by the rules for filing any document. In any instance in which a time limit is not prescribed for an action to be taken in a proceeding, the Commission or the Presiding Officer may set a time limit for that action.

§ 12.8 Date of entry of orders.

In computing any period of time involving the date of the entry of an order the date of entry shall be the date the order is served with the Hearing Clerk.

§ 12.9 Ex parte communications in reparation proceedings.

(a) *Definitions.* For purposes of this section:

(1) "Commission decisional employee" means employees of the Commission who are or may reasonably be expected to be involved in the decision-making process in any proceeding, including, but not limited to:

(i) Members of the personal staffs of the Commissioners;

(ii) Members of the staffs of the Administrative Law Judges;

(iii) The Chief and members of the Opinions section;

(iv) Members of the staff of the Office of Hearings and Appeals; and

(v) Other Commission employees who may be assigned to hear or to participate in the decision of a particular matter;

(2) "Ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include requests for status reports on any matter or proceeding covered by this Part;

(3) "Interested person" includes parties and other persons who might be adversely affected or aggrieved by the outcome of a proceeding; their officers, agents, employees, associates, affiliates, attorneys, accountants or other representatives; and any other person havinga direct or indirect pecuniary or other interest in the outcome of a proceeding;

(4) "Party" includes a complainant, respondent and any other person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, to a reparation proceeding, and a person or agency permitted limited participation or to state views in a reparation proceeding by the Commission.

(b) *Prohibitions against ex parte communications.* (1) No interested person outside the Commission shall make or knowingly cause to be made to any Commissioner, Administrative Law Judge or Commission decisional employee an ex parte communication relevant to the merits of a proceeding.

(2) No Commissioner, Administrative Law Judge or Commission decisional employee shall make or knowingly cause to be made to any interested person outside the Commission an ex parte communication relevant to the merits of a proceeding.

(c) *Procedures for handling ex parte communications.* A Commissioner, Administrative Law Judge or Commission decisional employee who receives, or who makes or knowingly causes to be made, an ex parte communication prohibited by paragraph (b) of this section shall:

(1) Place on the public record of the proceeding:

(i) All such written communications;

(ii) Memoranda stating the substance of all such oral communications; and

(iii) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (c)(1)(i) and (1)(ii) of this section; and

(2) Promptly give written notice of such communication and responses thereto to all parties to the proceedings to which the communication or responses relate.

(d) *Sanctions.* (1) Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party in violation of the prohibition contained in paragraph (b)(1) of this section, the Commission, Administrative Law Judge or other Commission employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the Act, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) Any attorney or accountant who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (b) of this section may, on that basis alone, be deemed to have engaged in unprofessional conduct of the type proscribed by 17 CFR 14.8(c).

(3) Any Commissioner, Administrative Law Judge or Commission decisional employee who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (b) of this section may, on that basis alone, be deemed to have engaged in conduct of the type proscribed by 17 CFR 140.735-3(b)(3).

(e) *Applicability of prohibitions and sanctions against ex parte communications.* (1) The prohibitions of this section against ex parte communications shall apply:

(i) To any person who has actual knowledge that a proceeding has been or will be commenced by order of the Commission; and

(ii) To all persons after public notice has been given that a proceeding has been or will be commenced by order of the Commission.

(2) The prohibitions of this section shall remain in effect until a final order has been entered in the proceed-

ing which is no longer subject to review or reconsideration by the Commission or to review by any court.

(3) Nothing in this section shall constitute authority to withhold information from Congress.

(Sec. 4, Pub. L. 94-409, 90 Stat. 1246, 1247 (5 U.S.C. 551(14), 556(d) and 557(d)); sec. 101 (a)(11), Pub. L. 93-463, 88 Stat. 1391 (7 U.S.C. 4a(j) (Supp. V, 1975)).)

[42 FR 13701, Mar. 11, 1977]

§ 12.10 Separation of functions.

(a) A Presiding Officer will not be responsible to or subject to the supervision or direction of any officer, employee, or agent of the Commission engaged in the performance of investigative or prosecutorial functions for the Commission.

(b) No officer, employee, or agent of the Federal Government engaged in the performance of investigative or prosecutorial functions in connection with any proceeding shall, in that proceeding or a factually related proceeding, participate or advise in the decision of the Presiding Officer, except as a witness or counsel in the proceeding, without the express written consent of the respondents in the proceeding. This provision shall not apply to the Commission or a member or members of the Commission.

§ 12.11 Appearance and practice before the Commission.

(a) *Appearance*—(1) *By non-attorneys.* An individual may appear pro se (in his own behalf), a member of a partnership may represent the partnership, a bona fide officer of a corporation, trust or association may represent the corporation, trust or association.

(2) *By attorneys.* An attorney-at-law who is admitted to practice before the highest Court of any State or territory or of the District of Columbia, who has not been suspended or disbarred from appearance and practice before the Commission in accordance with provisions of Part 14 of this Chapter may represent parties as an attorney in proceedings before the Commission.

(b) *Practice Before the Commission.* Any person may practice before the Commission in connection with a reparation proceeding who has not been suspended or disbarred from appearance or practice before the Commission in accordance with provisions of Part 14 of this Chapter.

(c) *Debarment of Counsel or Representative by Presiding Officer During the Course of a Proceeding.* (1) Whenever, while a proceeding is pending before him, the Presiding Officer finds that a person acting as counsel or representative for any party to the proceeding is guilty of contemptuous conduct, the Presiding Officer may order that such person be precluded from further acting as counsel or representative in such proceeding. An immediate appeal to the Commission may be taken from any such order, pursuant to the provisions of § 12.47, but the proceeding shall not be delayed or superseded pending disposition of the appeal; *Provided,* That the Presiding Officer may suspend the proceedings for a reasonable time for the purpose of enabling the party to obtain other counsel or representative.

(2) Whenever the Presiding Officer has issued an order precluding a person from further acting as counsel or representative in the proceeding, the Presiding Officer, within a reasonable time thereafter, shall submit to the Commission a report of the facts and circumstances surrounding the issuance of the order and shall recommend what action the Commission should take respecting the appearance of such person as counsel or representative in other proceedings before the Commission.

Subpart B—Initial Procedure With Respect to Reparation Complaints

§ 12.21 Complaint.

Any person complaining of any violation of any provision of the Act or any rule, regulation, or order thereunder by any person who is registered or required to be registered with the Commission under sections 4r, 4e, 4k or 4m of the Act as a futures commission merchant, floor broker, person associated with a futures commission merchant or agents thereof, commodity trading advisor or commodity pool operator may, at any time within two years after the cause of action accrues, apply to the Commission for a reparation award by petitioning the Commission to determine the amount of damage, if any, to which the complainant is entitled as a result of the violation and to issue an order directing the offender to pay that amount to the complainant on or before a date fixed by the order; *Provided,* That no such application shall be considered with respect to claims that arose prior to January 23, 1975.

(a) *Form of complaint.* A complaint submitted to the Commission pursuant to this section shall briefly state the facts that are claimed to constitute a violation of any provision of the Act or any rule, regulation or order thereunder. The facts should be set forth in a manner that will permit each fact to be admitted or denied, as the case may be, by the person or persons alleged to have committed the violations. Each complaint shall include:

(1) The name and residence address of the complainant;

(2) The name and address, if known, of each person alleged in the complaint to have violated the Act or any rule, regulation or order thereunder;

(3) If possible, the specific provisions of the Act, rule, regulation or order claimed to have been violated;

(4) All relevant facts concerning each and every act or omission which it is claimed constitute a violation, including the date and place of each alleged act or omission;

(5) Facts showing the manner in which it is claimed the complainant was injured by the alleged violations;

(6) The amount of damages the complainant claims to have suffered and the method by which those damages have been computed; and

(7) A statement that no arbitration proceeding or civil court litigation, based on the same facts set forth and against the same parties named as respondents in the complaint, has been instituted or is presently pending.

(b) *Subscription and verification of the complaint; exhibits.* Each complaint shall be signed personally by an individual complainant or by a duly authorized officer or agent of a complainant who is not a natural person. His signature shall be given under oath attesting either that he knows the facts set forth in the complaint to be true, or that he believes the facts set forth to be true, in which event the information upon which he formed that belief shall be set forth with particularity. A true copy of each and every document possessed by or available to the complainant which evidences the facts set forth in the complaint shall be annexed to the complaint.

(c) *Time and place of filing of complaint.* A complaint shall be filed by delivering a copy thereof, in proper form, to the Commission at its principal offices in Washington, D.C., addressed to the attention of the Reparations Section. The complaint may be filed in person, during normal business hours, or by mail.

(d) *Bond required if complainant is non-resident.* If a petition for reparations is filed by a non-resident of the United States, the complainant shall first file a bond in double the amount of the claim either with a surety company approved by the Treasury Department of the United States as surety or with two personal sureties, each of whom shall be a citizen of the United States and shall qualify as financially responsible for the entire amount of the bond. The bond shall run to the respondent and be conditioned upon the payment of (1) costs, including reasonable attorney's fees, for the respondent if the respondent shall prevail; and (2) any reparation award that may be issued by the Commission against the complainant on any counterclaim asserted by respondent: *Provided,* That the furnishing of a bond may be waived if the complainant is a resident of a country which permits filing of a complaint by a resident of the United States against a citizen of that country without the furnishing of a bond.

(Secs. 2a(11), 8a(5) and 14 of the Commodity Exchange Act, 7 U.S.C. 4a(j), 12a(5) and 18, as amended by Pub. L. 95-405, sec. 21, 92 Stat. 875-6)

[41 FR 4001, Jan. 27, 1976, as amended at 44 FR 12027, Mar. 5, 1979]

§ 12.22 Notification to registrant of complaint.

If, in the opinion of the Commission, the facts set forth in a complaint warrant such action, a copy of the complaint, together with any attachments thereto, shall be forwarded by registered mail, certified mail, or otherwise by the Commission to each registrant named therein at an office previously designated with the Commission by the registrant for receipt of reparation complaints or, if no such designation has been filed with the Commission, at the registrant's principal place of business as shown in the records of the Commission. The complaint shall not be forwarded if it appears, in the opinion of the Commission, that the alleged facts, even if true, do not evidence a violation of the Act or any rule or regulation or order thereunder or do not show that the complainant suffered damages as a result of the alleged violation. If the Commission should determine not to forward the complaint to the registrant in accordance with this section, no proceeding shall be held thereon and the complainant shall be notified to that effect, but this decision shall be without prejudice to the right of the complainant to seek such alternate forms of relief as may be available.

§ 12.23 Response to complaint.

Within forty-five (45) days after the complaint was forwarded by registered mail, certified mail, or otherwise to the registrant, or within such further time as the Commission may permit, each registrant shall either satisfy the complaint or answer it in writing.

(a) *Satisfaction of Complaint.* A registrant may satisfy the complaint by paying to the complainant either the amount to which the complainant claims to be entitled as set forth in the complaint or such other amount as the complainant will accept in satisfaction of his claim. If a complaint is satisfied, a notice of satisfaction and withdrawal of the complaint as to that registrant, duly executed by the complainant and registrant before a notary public, shall be filed with the Commission in substantially the following form:

[Caption]

Registrant ———— [Name] having satisfied the reparation complaint filed against him on ———— [Date], by ————[Name], that complaint is hereby withdrawn. Registrant, by satisfying that complaint neither admits nor denies violating any provision of the Commodity

Exchange Act, as amended, or any rule, regulation or order thereunder.

_____
Complainant

_____
Registrant

[Jurat]

If the complainant should fail or refuse to execute a notice of satisfaction and withdrawal of the complaint after the registrant has paid the complainant the amount to which the complainant has claimed to be entitled, the registrant may serve upon the complainant and file with the Commission an affidavit of satisfaction setting forth facts showing that the payment has been made. Upon the filing of a notice of satisfaction and withdrawal of the complaint as to a registrant, the proceeding shall be discontinued as to that registrant and no reparation award shall thereafter be entered against that registrant in favor of that complainant based upon the violations alleged in that complaint. In the absence of objection thereto by the complainant, an affidavit of satisfaction shall have the same effect as a notice of satisfaction and withdrawal of the complaint.

(b) *Answer*—(1) *Form and content.* The answer shall contain a precise and detailed statement of the facts which constitute the grounds for defense, and shall specifically admit, deny, or explain each of the allegations of the complaint. If the registrant is without knowledge or information sufficient to form a belief as to the truth of an allegation, he shall so state, and this will have the effect of a denial. An answer may state that the registrant admits all of the allegations of the complaint, or admits liability for a portion, but not all, of the amount claimed as damages. Each answer shall be signed personally by an individual registrant or by a duly authorized officer or agent of the registrant (who has knowledge of the matters set forth in the complaint) if the registrant is not a natural person. His signature shall be given under oath attesting that he has read the answer; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. Where a complainant alleges facts tending to prove that one or more employees or agents of a registrant have participated in the alleged violations, they shall each separately subscribe to and verify the answer or state under oath, in a document appended to the answer, why they have not done so. To the extent that the pleading is not based upon his personal knowledge he shall set forth with particularity the information upon which he believes there is good ground to support the answer. A true copy of each and every document possessed by or available to the registrant, which support the denials or other matters of defense set forth in the answer, shall be annexed to the answer unless they have been annexed to the complaint.

(2) *Counterclaims.* An answer may set forth as a counterclaim facts alleging a violation and a request for a reparation award that would be a proper subject for a complaint under § 12.21 or any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.

(3) *Affidavit of service.* The registrant shall file with his answer an affidavit showing that he has served a true copy of the answer upon the complainant, either personally or by mail addressed to the complainant at the address set forth in the complaint.

§ 12.24 Reply.

If the answer asserts a counterclaim, the complainant shall file a reply to

the counterclaim with the Commission within thirty (3) days after service of the answer. The reply shall be strictly confined to the matters alleged in the counterclaim, and shall in all respects conform to the requirements set forth in § 12.23(b) with respect to the form and content and other requirements concerning an answer. A complainant may satisfy a counterclaim, as if it were a complaint, in the manner set forth in § 12.23(a).

§ 12.25 Investigation of complaint.

If there appears to be, in the opinion of the Commission, any reasonable grounds for investigating any complaint made in accordance with § 12.21 the Commission may investigate such complaint to the extent and in such manner as it, in its sole discretion, may deem appropriate. If an investigation is undertaken, the Commission may, in its discretion, for that reason delay institution of a formal reparation proceeding.

§ 12.26 Effect of failure to file answer or reply; default.

(a) *Findings and conclusions.* Failure timely to file an answer to a complaint or a reply to a counterclaim shall be treated as an admission of the allegations of the complaint or counterclaim, shall constitute a waiver of hearing on the facts set forth in the complaint or counterclaim, and shall result in the institution of a formal adjudicatory proceeding in accordance with § 12.31 upon the payment of the appropriate filing fee set forth in § 12.27 by either the complainant or registrant. The previously forwarded complaint, and the answer if no reply has been filed to a counterclaim set forth in the answer, shall be deemed to have been served for purposes of the institution of a formal adjudicatory proceeding. The proceeding shall be docketed in accordance with § 12.41 and a Presiding Officer shall be appointed in accordance with § 12.42. The Presiding Officer may thereafter, upon the motion of the complaining party, enter findings and conclusions concerning the questions of violation and damages and may enter an appropriate reparation award. If the facts which are treated as admitted are considered insufficient to support the amount of reparations sought, the proceeding may continue on the question of damages only.

(b) *Setting Aside of Default.* In order to prevent injustice and on such conditions as may be appropriate, the Presiding Officer may at any time for good cause set aside a default order or award obtained under paragraph (a) of this section. Any motion to set aside such a default order shall be made within a reasonable time, and shall state the reasons for the failure to file and specify the nature of the proposed defense in the proceeding.

§ 12.27 Filing fees.

(a) Prior to the institution of a formal adjudicatory proceeding in accordance with § 12.31, the Commission shall serve upon the complainant and registrant a notice informing the parties that the Commission is of the opinion that the facts warrant the institution of a formal adjudicatory proceeding. In the event such notice is sent, a formal adjudicatory proceeding shall commence upon payment by the complainant, within a reasonable period of time, of a filing fee of $25.

(b) Payment of the filing fee shall be by check or money order, payable to the Treasury of the United States.

[41 FR 30587, July 26, 1976]

Subpart C—Institution and Settlement of Formal Adjudicatory Proceeding

§ 12.31 Institution of formal adjudicatory proceeding.

If in the Commission's opinion the

facts warrant such action and upon the payment of the filing fee required by § 12.27, the Commission may, in its discretion, in the manner prescribed in § 12.48, notify the respondent and complainant, by registered or certified mail, that the Commission has instituted a formal adjudicatory proceeding based on the previously forwarded complaint, answer and reply, if any, and that the respondent shall have an opportunity for hearing thereon before an Administrative Law Judge designated by the Commission in a place in which the respondent is engaged in business with due regard given to the convenience of the parties: *Provided*, That in complaints wherein the amount claimed as damages does not exceed the sum of $2,500 ($5,000 where the complaint is filed with the Commission on or after October 1, 1978) a hearing need not be held and proof in support of the complaint and in support of the respondent's answer may be supplied in the form of depositions or verified statements of fact in accordance with the summary procedures set forth in § 12.91 through § 12.95 of this Part and notice of the summary procedure will be given in lieu of an opportunity for hearing. A formal reparation proceeding is commenced when a complaint is served in the manner prescribed in this section.

(Secs. 2a(11), 8a(5) and 14 of the Commodity Exchange Act, 7 U.S.C. 4a(j), 12a(5) and 18, as amended by Pub. L. 95-405, sec. 21, 92 Stat. 875-6)

[41 FR 4003, Jan. 27, 1976, as amended at 44 FR 12027, Mar. 5, 1979]

§ 12.32 Discontinuance of proceeding.

If the Commission should determine not to proceed in the manner set forth in § 12.31, the reparation proceeding shall terminate without prejudice to the right of the complainant to seek such alternative forms of relief as may be available to him. If the proceeding should be discontinued the Commission shall promptly give notice to that effect to the complainant by registered or certified mail.

§ 12.33 Admissions of partial liability.

If in the answer the respondent admits liability for a portion, but not all of the amount claimed as damage, and the answer does not assert a counterclaim, the Presiding Officer may, unless the respondent has already made reparation, issue an order directing the respondent to pay the undisputed amount on or before a date fixed in the order. Thereafter liability with respect to the remaining disputed amount shall be determined in accordance with the procedure that would have been followed if no order had been issued by the Presiding Officer with respect to the undisputed sum. If in the reply the complainant admits liability for a portion but not all of the amount claimed as damage, the Presiding Officer may enter an award for that amount and issue an order directing the complainant to pay the undisputed amount on or before a date fixed by the order.

§ 12.34 Settlement—Statements of satisfaction and discontinuance of proceedings.

If, at any time before there has been a final determination by the Commission, the respondent satisfies the complaint, or the complainant and respondent reach an accord as to the amount of damages that will satisfy the complaint and any counterclaim set forth in the respondent's answer, the complainant and respondent shall file with the Commission a signed statement of satisfaction and discontinuance of proceeding. The proceeding will thereafter be discontinued. The statement of satisfaction and discontinuance of proceeding shall be filed with the Commission in substantially one of the following forms:

[Caption]

Respondent ———————— [Name] having satisfied the reparation complaint against him on ———— [Date] by ———————— [Name], that the complaint is hereby withdrawn.

———————
Complainant

———————
Respondent

[Jurat]

or

[Caption]

Respondent ———————— [Name] having satisfied the reparation complaint filed against him on ———— [Date], by ———————— [Name], and the complainant [Name] ———————— having satisfied the counterclaim asserted against him in respondent's answer filed with the Commission on ———— [Date] the complaint and counterclaim are hereby withdrawn.

———————
Complainant

———————
[Jurat] Respondent

If after satisfaction of the complaint or counterclaim the complaining party refuses to sign a Statement of Satisfaction and Discontinuance, a party who has satisfied a claim against him may file with the Commission and serve on the other party a motion for discontinuance to be accompanied by an affidavit setting forth in detail the facts surrounding the satisfaction or a copy of any stipulation entered into by the parties evidencing satisfaction of the complaint or counterclaim. If the motion is uncontested the proceeding will be ordered discontinued.

Subpart D—Formal Adjudicatory Proceeding

§ 12.41 Docketing of proceeding.

Upon service of the notification in accordance with § 12.31, or upon a default or admission of partial liability as set forth in § 12.26 or § 12.33 the Hearing Clerk shall assign a docket number to the proceeding and maintain the official docket. Thereafter the proceeding may be identified by such number.

§ 12.42 Assignment to presiding officer.

Immediately following docketing of the proceeding, the proceeding shall be assigned to the Presiding Officer. To the extent permitted by law, the powers hereinafter conferred upon the Presiding Officer shall be applicable to the Commission.

§ 12.43 Functions and responsibilities of the Presiding Officer.

The Presiding Officer shall be responsible for the fair and orderly conduct of the proceeding and shall have the authority to:

(a) Administer oath and affirmations;

(b) Issue subpoenas;

(c) Rule on offers of proof;

(d) Receive relevant evidence;

(e) Examine witnesses;

(f) Regulate the course of the hearing;

(g) Hold prehearing conferences;

(h) Consider and rule upon all motions;

(i) Make decisions in accordance with § 12.84 and § 12.95;

(j) Certify interlocutory matters to the Commission for its determination in accordance with § 12.47(a)(4);

(k) Take such action as is appropriate if a party or agent of a party fails to comply with an order issued by the Presiding Officer; and

(l) Take any other action required to give effect to these rules regulating to reparation proceedings, including but not limited to requesting the parties to file briefs and statements of position with respect to any issue in the proceeding.

§ 12.44 Disqualification of Presiding Officer.

(a) *At His Own Request.* A Presiding Officer may withdraw from any proceeding when he considers himself to be disqualified. In such event he shall immediately notify the Commission and each of the parties of his withdrawal and of his reason for such action.

(b) *Upon the Request of a Party.* Any party may request a Presiding Officer to disqualify himself on the grounds of personal bias, conflict or similar bases. Interlocutory review of an adverse ruling by the Presiding Officer may be sought without certification of the matter by the Presiding Officer only in accordance with the procedures set forth in § 12.47 (b).

§ 12.45 Amendments and supplemental pleadings.

(a) *Amendments.* At any time prior to the close of the hearing in a reparation proceeding, the Presiding Officer may allow amendments of the pleadings either upon written consent of the parties or for good cause shown.

(b) *Supplemental Pleadings.* Upon reasonable notice, and upon such terms as are just, the Presiding Officer may, upon the motion of a party, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleadings sought to be supplemented and which are relevant to any of the issues involved.

(c) *Response to Amendments and Supplements.* Any party may file a response to any amendment or supplement to a pleading within ten (10) days after date of service upon him of the amendment or supplement.

(d) *Pleadings to Conform to the Evidence.* When issues not raised by the pleadings but reasonably within the scope of a reparation proceeding initiated by the complaint are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

(e) *Subscription and Verification.* All amendments and supplemental pleadings shall be subscribed and verified in the same manner as the pleadings they are amending or supplementing.

§ 12.46 Motions.

(a) *Presentation.* An application for a form of relief not otherwise specifically provided for in these rules shall be made by a motion, which shall be in writing unless made on the record during a hearing. The motion shall state: (1) The relief sought; (2) the basis for relief; and (3) the authority relied upon. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. All motions and applications, unless otherwise provided in these rules, shall be directed to the Presiding Officer prior to the filing of an initial decision in a proceeding, and to the Commission after the initial decision has been filed.

(b) *Answer to Motions.* Any party may serve and file a written response to a motion within ten (10) days after service of the motion upon him or within such longer or shorter period as established by these rules or as the Presiding Officer or the Commission may direct. Any party who does not file a response to a motion shall be deemed to have consented to the relief sought by the motion.

(c) *Motions for Procedural Orders.* Motions for procedural orders, including motions for extension of time, may be acted on at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

(d) *Dilatory Motions.* Repetitive or numerous motions dealing with the same subject matter shall not be permitted.

§ 12.47 Interlocutory review by the Commission.

Interlocutory review by the Commission of a ruling on a motion by a Presiding Officer may be sought in accordance with the following procedure:

(a) *Scope of review.* The Commission will not review a ruling of the Presiding Officer prior to the Commission's consideration of the proceeding in the absence of extraordinary circumstances. An interlocutory appeal may be permitted, in the discretion of the Commission, under the following circumstances:

(1) Appeal from a ruling pursuant to § 12.44 on a motion to disqualify a Presiding Officer.

(2) Appeal from a ruling pursuant to § 12.11 suspending an attorney from participation in a reparation proceeding.

(3) Appeal from a ruling pursuant to § 12.72 ordering consolidation of proceedings.

(4) Upon a determination by the Presiding Officer certified to the Commission either in writing or on the record, that (i) a ruling sought to be appealed involves a controlling question of law or policy, (ii) an immediate appeal may materially advance the ultimate resolution of the issues in the proceeding, (iii) subsequent reversal of the ruling would cause unnecessary delay or expense to the parties.

(b) *Procedure to obtain interlocutory review.* (1) An application for interlocutory review may be served and filed within five (5) days after notice of the Presiding Officer's ruling on a matter described in § 12.47(a) (1), (2) or (3) or within five (5) days after a determination is made by a Presiding Officer in the manner described in § 12.47(a)(4).

(2) An application for review shall:

(i) Designate the ruling or part thereof from which appeal is being taken;

(ii) Present the points of fact and law relied upon in support of the position taken; and

(iii) Not exceed 15 pages.

(3) Any party that opposes the application may file a response, not to exceed 15 pages, within five (5) days after service of the application.

(4) The Commission will determine whether to grant a review based upon the application for review and the response thereto, without oral argument or further written presentation, unless the Commission shall otherwise direct.

(c) *Proceedings not stayed.* The filing of an application for review and the grant of review shall not stay proceedings before a Presiding Officer unless the Presiding Officer or the Commission shall so order. The Commission will not consider a motion for a stay unless the motion shall have first been made to the Presiding Officer and denied.

§ 12.48 Service.

(a) *Number of copies; when required.* Two copies of all pleadings, motions, petitions or applications made in the course of a proceeding (unless made orally during a hearing), all proposed findings and conclusions, all petitions for review of any initial decision, and all briefs shall be served by the party upon all parties to the proceeding.

(b) *How service is made.* Service shall be made either by personal service or by first-class mail. Service shall be complete at the time of personal service or upon deposit in the mails of a properly addressed and post-paid document. Where a party effects service by mail, the time within which the person served may respond thereto shall be increased by three (3) days.

(c) *Proof of service.* Proof of service of a document shall be made by filing with the Hearing Clerk, simultaneously with the filing of the required number of copies of the document, an affidavit of service executed by any person 18 years of age or older or a certificate of service executed by an attorney-at-law qualified to practice before the Commission. The proof of service shall identify the persons served, state that service has been made, set forth the date of service, and recite the manner of service.

§ 12.49 Service of decisions and orders.

A copy of all rulings, opinions and orders of the Presiding Officer and the Commission shall be served by the Hearing Clerk on each of the parties.

§ 12.50 Designation of person to receive service.

The first document filed in a proceeding by or on behalf of any party subsequent to formal service of the complaint shall state on the first page thereof the name and post office address of the person who is authorized to receive service for him of all documents filed in the formal proceeding. Thereafter, service of documents shall be made upon the person authorized unless service on the party himself is ordered by the Presiding Officer or the Commission, or unless no person authorized to receive service can be found or unless the person authorized is changed by the party upon due notice to all other parties.

§ 12.51 Filing of documents with the Hearing Clerk.

All documents which are required to be served upon a party shall be filed concurrently with the Hearing Clerk. A document shall be filed by delivering it in person or by certified or registered mail with return receipt requested to:

Hearing Clerk, Office of Hearings and Appeals, Commodity Futures Trading Commission, 2033 K Street, NW., Washington, D.C. 20581.

To be timely filed a document must be received by the Hearing Clerk within the time prescribed for filing.

[41 FR 3999, Jan. 27, 1976, as amended at 41 FR 28260, July 9, 1976]

§ 12.52 Formalities of filing.

(a) *Number of copies.* Unless otherwise specifically provided, an original and five conformed copies of all documents shall be filed with the Hearing Clerk.

(b) *Title page.* All documents filed with the Hearing Clerk must include at the head thereof, or on a title page, the name of the Commission, the docket number and title of the proceeding, the subject of the particular document and the name of the person in whose behalf the document is being filed. In the complaint the title of the action shall include the names of all the complainants and respondents, but in documents subsequently filed it is sufficient to state the name of the first complainant and first respondent named in the complaint with an appropriate indication of other parties.

(c) *Paper, spacing, type.* All documents filed under this Part shall be typewritten, mimeographed, printed, or otherwise reproduced by a process that produces permanent and plainly legible copies, shall be on one grade of good unglazed white paper no less than 8 or more than 8½ inches wide and no less than 10½ or more than 14 inches long and shall be bound on the top only. They shall be double-spaced, except for long quotations (3 or more lines) and footnotes which should be single-spaced. If printed, the documents shall be in either 10- or 12-point type with double-leaded text and single-leaded quotations and footnotes.

(d) *Signatures.* The original copy of all papers must be signed in ink by the person filing the same or by his duly authorized agent or attorney.

(e) *Length and form of briefs.* All briefs filed with the Hearing Clerk containing more than 10 pages shall include an index and a table of cases and other authorities cited. The date of each brief must appear on its front cover or title page and on its signature page. No brief shall exceed 60 pages in length, except with the permission of the Presiding Officer or, by the Commission, to whomever the brief is directed.

§ 12.53 Subscription.

(a) *By whom.* Motions and answers thereto, briefs and other documents filed with the Commission shall be subscribed:

(1) By the person or persons on whose behalf they are tendered for filing;

(2) By a partner, officer or director of a partnership, corporation, association, or other legal entity; or

(3) By an attorney-at-law having authority with respect thereto.

The Hearing Clerk may require appropriate evidence the authority of a person subscribing a document on behalf of another person.

(b) *Effect.* The signature on any document of any person acting either for himself or as attorney or agent for another constitutes certification by him that:

(1) He has read the document subscribed and knows the contents thereof;

(2) If executed in any representative capacity, it was done with full power and authority to do so;

(3) To the best of his knowledge, information and belief, every statement contained in the document is true and not misleading; and

(4) The document is not being interposed for delay.

(c) *Sham documents.* If a document is not signed or is signed with an intent to defeat the purpose of this rule, it may be stricken as sham or false. For a willful violation of this rule an attorney or representative for any party may be subjected to appropriate disciplinary action pursuant to § 12.11. Similar action may be taken if scandalous matter is inserted.

Subpart E—Prehearing Conferences; Discovery and Summary Disposition

§ 12.61 Conferences; procedural matters.

(a) At any time after institution of a formal adjudicatory proceeding as provided in § 12.31 the Administrative Law Judge may direct that one or more conferences be held, in person or by telephone, for the purposes of:

(1) Clarifying issues;

(2) Examining the possibility of obtaining stipulations, admissions of fact and of authenticity of contents of documents;

(3) Determining matters of which official notice may be taken;

(4) Discussing amendments to pleadings;

(5) Limiting the number of witnesses; or

(6) Promoting a fair and expeditious hearing.

At or following the conclusion of a prehearing conference, the Administrative Law Judge shall serve a prehearing memorandum containing agreements reached and any procedural determinations made by him unless the conference shall have been recorded and transcribed in written form and a copy of the transcript has been made available to each party.

(Pub. L. 93-463, Secs. 101, 106, 88 Stat. 1391, 1393 (7 U.S.C. 2a(11), 18).)

[42 FR 16114, Mar. 24, 1977]

§ 12.62 Discovery.

(a) *Methods.* Parties may obtain discovery of a party or an officer or agent of a party by the following methods in accordance with the procedures set forth in the section indicated:

(1) Production of documents or other items (§ 12.63);
(2) Depositions on written interrogatories (§ 12.64);
(3) Admissions (§ 12.65).

(b) *Scope.* The scope of discovery is as follows:

(1) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter in the pending proceeding, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Protective orders.* Upon motion directed to the Presiding Officer by a party or by the person from whom discovery is sought, and for good cause shown, any order which justice requires may be issued to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent the raising of issues untimely or inappropriate to the proceeding, or the inappropriate disclosure of trade secrets or sensitive commercial or financial information. Relief through a protective order may include one or more of the following:

(i) That discovery not be had;
(ii) That discovery may be had only on specified terms and conditions;
(iii) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
(iv) That a trade secret or other confidential commercial information not be disclosed or be disclosed only in a designated way;
(v) That the parties simultaneously file specified documents or information in sealed envelopes to be opened only as directed by the Presiding Officer or the Commission.

(c) *Time limit.* Discovery by all parties will be completed within such time as the Presiding Officer directs from either the date the answer is served on complainant or the date the reply is served on the respondent if the answer contains a counterclaim.

§ 12.63 Production of documents and tangible things.

Any party, within the time prescribed for discovery by the Presiding Officer, may serve on any other party, a notice to produce copies of specifically designated categories of documents, papers, books, accounts, letters, photographs, objects, or tangible things which would constitute or contain evidence relating to any matter, which is relevant to the subject matter involved in the pending proceeding, and which is in the party's possession, custody or control. A copy of the notice shall be served on all other parties to the proceeding. All documents requested in the notice to produce shall be served on the party seeking the discovery within twenty (20) days after service of the notice to produce.

§ 12.64 Depositions on written interrogatories.

(a) *Notice.* Any party, within the time prescribed for discovery by the Presiding Officer, may serve on any other party or any officer or agent of a party a notice of the taking of a deposition on written interrogatories.

(b) *Reply.* (1) Each interrogatory served shall be answered by the party

served or if the party is a corporation, partnership, association, or government agency, by any officer or agent thereof selected by the responding party.

(2) Each interrogatory shall be answered separately and fully in writing, unless objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed and verified by the person making them. The person upon whom a notice to take a deposition on written interrogatories have been served shall serve a copy of the answers and objections within the time period designated by the party submitting the interrogatories but not less than twenty (20) days after service thereof.

(c) *Deposition of a non-party.* The deposition on written interrogatories of a non-party may be taken only within the time prescribed for discovery by the Presiding Officer and only pursuant to an order entered and subpoena issued by the Presiding Officer in accordance with the provisions of § 12.74; *Provided,* That the deposition on written interrogatories of a Commission member or employee may only be taken upon a showing that the Commission member or employee has personal knowledge of the matters sought to be discovered (i.e., not obtained pursuant to a Commission investigation), that the information sought to be discovered is relevant and material and that the information sought to be discovered is not available from other sources.

(d) *Use of depositions on written interrogatories at hearings.* Depositions on written interrogatories may be used against the responding party, except that objection may be made at the hearing to receiving in evidence any interrogatory for any reason which would require the exclusion of the evidence if the party was then present and testifying.

§ 12.65 Admissions.

(a) *Request for admissions.* Any party may serve upon any other party a written request for admission of the truth of any matters relevant to the pending proceeding set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. A copy of the request shall be filed with the Hearing Clerk.

(b) *Reply.* Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within fifteen (15) days after service of the request, or within such shorter or longer time as the Presiding Officer may allow, the party upon whom the request is directed serves upon the party requesting the admission a sworn written answer or objection to the matter. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission and when good faith requires that a party qualify his answer and deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give a lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or reasonably available to him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for

trial may not, on that ground alone, object to the request; he may deny the matter or set forth reasons why he cannot admit or deny it.

(c) *Determining sufficiency of answers or objections.* The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objecting party sustains his burden of showing that the objection is justified, the Presiding Officer shall order that an answer be served. If the Presiding Officer determines that an answer does not comply with the requirements of this rule, he may order either that the matter is admitted or that an amended answer be served.

(d) *Effect of admission.* Any matter admitted under this rule is conclusively established and may be used at hearing as against the party who made the admission. However, the Presiding Officer may permit withdrawal or amendment when the presentation of the merits of the proceeding will be served thereby and the party who obtains the admission fails to satisfy the Presiding Officer that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

§ 12.66 Consequences of the failure of a party to comply with a discovery notice or request.

If a party or an officer or agent of a party fails to comply with a notice relating to discovery the Presiding Officer may take such action in regard thereto as is just, including but not limited to the following:

(a) Infer that the testimony or documents would have been adverse to the party;

(b) Rule that for the purposes of the proceeding the matter or matters sought to be discovered be taken as established adversely to the party;

(c) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, or the documents or other evidence;

(d) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(e) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which discovery was sought, be stricken, or that a decision of the proceeding be rendered against the party, or both. It shall be the duty of parties to seek by motion and Presiding Officer to grant such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the lack of withheld testimony or documents or other evidence.

§ 12.67 Summary disposition.

(a) *Filing of motions, answers.* Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law may move for a summary disposition in his favor of all or any part of the proceeding. Such motion shall be filed at or before the first prehearing conference or at such later time as may be allowed by the Administrative Law Judge. Any adverse party, within 20 days after service of the motion, may serve opposing papers or may countermove for summary disposition.

(b) *Supporting papers.* A motion for summary disposition shall include a statement of material facts as to which the moving party contends there is no genuine issue, supported by the pleadings, and by affidavits, other verified statements, admissions, stipulations, and depositions. The motion may also be supported by briefs containing points and authorities in support of the contention of the party

making the motion. When a motion is made and supported as provided in this section, unless otherwise ordered by the Administrative Law Judge, an adverse party may not rest upon the mere allegations, but shall serve and file in response a statement setting forth those material facts as to which he contends a genuine issue exists, supported by affidavits or otherwise. He may also submit a brief of points and authorities.

(c) *Oral argument.* Oral argument may be granted at the discretion of the Administrative Law Judge.

(d) *Summary disposition upon the motion of the Administrative Law Judge.* If the Administrative Law Judge believes that there may be no genuine issue of material fact to be determined and that one of the parties may be entitled to a decision as a matter of law, he may direct the parties to submit papers in support of and in opposition to summary disposition, and may hear oral argument, substantially as provided in paragraphs (a), (b), and (c) of this section.

(e) *Ruling on summary disposition.* The Administrative Law Judge shall grant summary disposition if the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and depositions, and matters of official notice show that (1) there is no genuine issue as to any material fact, (2) there is no necessity that further facts be developed in the record, and (3) a party is entitled to a decision as a matter of law.

(f) *Review of ruling; appeal.* An order denying a motion for summary disposition is subject to interlocutory review under the provisions of § 12.47 on the same terms as a ruling on any other motion. An order granting summary disposition may be reviewed by the Commission, in its discretion, in accordance with the provisions of § 12.101 relating to appeals of initial decisions.

(Pub. L. 93-463, Secs. 101, 106, 88 Stat. 1391, 1393 (7 U.S.C. 2a(11) 18))

[42 FR 16114 Mar. 24, 1977]

Subpart F—Hearings

§ 12.71 Oral hearings.

(a) *When required.* (1) Where the amount of damages claimed, either in the complaint or in a counterclaim, is in excess of $2,500 ($5,000 where the complaint is filed with the Commission on or after October 1, 1978) a hearing shall be held in accordance with the procedure set forth in this section unless all the parties have waived their right to a hearing.

(2) Where the amount of damages claimed, either in the complaint or in a counterclaim, does not exceed $2,500, an oral hearing shall not be held, unless ordered by the Commission either on its own motion or upon application by a party setting forth the particular circumstances making an oral hearing necessary for a proper resolution of the issues.

(3) In all cases in which a hearing is not held the procedures set forth in §§ 12.91 through 12.95 shall apply.

(b) *Who may appear.* The parties may appear in person, by counsel or by other representatives of their choosing, subject to the provisions of § 12.11 of these rules, dealing with appearance and practice before the Commission.

(c) *Effect of failure to appear.* (1) If any party to the proceeding, after filing an answer fails to appear at the hearing or any part thereof, he shall to that extent be deemed to have waived the right to an oral hearing in the proceeding. In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present may present his evidence, in whole or in part, in the form of affidavits or by oral testimony, before the Administrative Law Judge.

(2) A failure to appear at a hearing shall not constitute a waiver of a party's right to propose findings of fact based on the record in the proceeding, to propose conclusions of law or to submit briefs, in the manner provided in § 12.82, if the non-appearing party submits prior to the scheduled hearing or within three (3) days thereafter, a Notice of Appearance indicating his intent to continue to participate in the proceeding. Otherwise, his failure to appear will constitute a default and a default order may be sought in accordance with the procedures set forth in § 12.26 of these rules.

(d) *Time and place.* If and when the proceeding has reached the stage of oral hearing, the Administrative Law Judge, giving careful consideration to the convenience of the parties, shall set a time for hearing and shall file with the Hearing Clerk a notice stating the time and place of a hearing. Unless the parties otherwise agree, the place of hearing shall be in a place where the respondent is engaged in business, with due regard given to the convenience of the parties. If any change in the time or place of the hearing becomes necessary, it shall be made by the Administrative Law Judge, who, in such event, shall file with the Hearing Clerk a notice of the change. Such notice shall be served upon the parties, unless it is made during the course of an oral hearing and made a part of the transcript.

(Secs. 2a(11), 8a(5) and 14 of the Commodity Exchange Act, 7 U.S.C. 4a(j), 12a(5) and 18, as amended by Pub. L. 95-405, sec. 21, 92 Stat. 875-6)

[41 FR 4006, Jan. 27, 1976, as amended at 44 FR 12027, Mar. 5, 1979]

§ 12.72 Consolidations.

(a) Where two or more reparation proceedings are based upon complaints alleging substantially similar activities by a respondent affecting the several complainants, the Chief Administrative Law Judge, upon application of any party to any of the proceedings, upon direction by the Commission, or upon his own motion, may join those proceedings for hearing of any or all the matters in issue or may consolidate those proceedings.

(b) Where joinder or consolidation has been ordered, the Administrative Law Judge may make such rulings concerning the conduct of the proceedings as may be necessary to avoid unnecessary costs or delay or prejudice to the participants to the reparation proceedings.

(c) Any party to a reparation proceeding which is consolidated pursuant to this section may seek interlocutory review by the Commission of the order of consolidation in accordance with the procedure set forth in § 12.47(b).

(Pub. L. 93-463, Secs. 101, 106, 88 Stat. 1391, 1393 (7 U.S.C. 2a(11), 18))

[42 FR 16115, Mar. 24, 1977]

§ 12.73 Public hearings.

All hearings shall be public except that upon application of a respondent or affected witness the Administrative Law Judge may direct that specific documents or testimony be received and retained non-publicly in order to prevent unwarranted disclosure of trade secrets or sensitive commercial or financial information or an unwarranted invasion of personal privacy.

§ 12.74 Subpoenas.

(a) *Application for and Issuance of Subpoenas*—(1) *Application for and issuance of Subpoena Ad Testificandum.* An application for a subpoena requiring a person to appear and testify at a reparation proceeding (subpoena ad testificandum) may be made, either orally or in writing by any party without notice to other parties. The application shall be made to the Adminis-

trative Law Judge or in the event that the Administrative Law Judge is not available, to the Chief Administrative Law Judge. Subject to § 12.74(a)(4) a subpoena shall be issued upon the request of any interested party upon tender of an original and two copies of such subpoena.

(2) *Application for Subpoena Duces Tecum.* An application for a subpoena requiring a person to appear and testify and to produce specified documentary or tangible evidence at a reparation proceeding (subpoena duces tecum) shall be submitted in duplicate and in writing, but need not be served upon all other parties. All such applications shall contain a statement or showing of general relevance and reasonable scope of the evidence sought and shall be accompanied by an original and two copies of the subpoena sought which shall describe the documentary or tangible evidence to be subpoenaed with as much particularity as is feasible. Notwithstanding the foregoing, for good cause shown application for a subpoena duces tecum may be made orally during the course of a hearing on the record to the Administrative Law Judge.

(3) *Standards for issuance of Subpoena Duces Tecum.* The Administrative Law Judge considering any application for a subpoena duces tecum shall issue the subpoena requested if he is satisfied the application complies with this section and the request is not unreasonable, oppressive, excessive in scope or unduly burdensome. No attempt shall be made to determine the admissibility of evidence in passing upon an application for a subpoena duces tecum and no detailed or burdensome showing shall be required as a condition to the issuance of any subpoena.

(4) *Denial of application.* In the event the Administrative Law Judge determines that a requested subpoena or any of its terms and unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena, or may issue it only upon such conditions as he determines fairness requires.

(5) *Attendance and mileage fees.* Persons summoned to testify at a hearing under requirement of subpoenas are entitled to the same fees and mileage as are paid to witnesses in the courts of the United States. Fees and mileage shall be paid by the party at whose instance the persons are called.

(b) *Special requirements relating to application for and issuance of subpoenas for Commission records and for the appearance of Commission employees*—(1) *Form.* An application for the issuance of a subpoena shall be made in the form of a written motion served upon all other parties, if the subpoena would require (i) the production of documents, papers, books, physical exhibits, or other material in the records of the Commission; or (ii) the appearance of a Commissioner or an official or employee of the Commission.

(2) *Content.* The motion shall specifically describe, the material to be produced, the information to be disclosed, or the testimony to be elicited from the witness, and shall show (i) the relevance of the material, information, or testimony to the matters at issue in the proceeding; (ii) The reasonableness of the scope of the proposed subpoena; and (iii) that such material, information, or testimony is not available from other sources.

(3) *Rulings.* The motion shall be decided by the Administrative Law Judge or in the event the Administrative Law Judge is not available, by the Chief Administrative Law Judge, and shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the witness as may appear necessary and appropriate

for the protection of the public interest.

§ 12.75 Motions to quash subpoena.

(a) *Application.* Any person upon whom a subpoena has been served may within seven (7) days after service or at any time prior to the return date thereof, whichever is earlier, file a motion to quash or modify the subpoena with the Presiding Officer who issued the subpoena, and serve a copy of such motion upon the party requesting the subpoena. The application shall be accompanied by a brief statement of the reasons therefor. If the Presiding Officer to whom the motion has been directed has not acted upon the motion by the return date, the subpoena date shall be stayed pending his final action.

(b) *Disposition.* After due notice to the person upon whose request the subpoena was issued, and after opportunity for response by that person, the Presiding Officer may (1) quash or modify the subpoena, or (2) condition denial of the application to quash or modify the subpoena upon just and reasonable terms, including, in the case of a subpoena duces tecum, a requirement that the person in whose behalf the subpoena was issued shall advance the reasonable cost of producing documentary or other tangible evidence.

§ 12.76 Service of subpoenas.

(a) *How effected.* Service of a subpoena upon a party shall be made in accordance with § 12.48 except that only one copy of a subpoena need be served. Service of a subpoena upon any other person shall be made by delivering a copy of the subpoena to him as provided in paragraph (b) or (c) of this section and by tendering to him the fees for one day's attendance and the mileage as specified in § 12.74(a)(5). When the subpoena is issued at the instance of any officer or agency of the United States, fees and mileage need not be tendered at the time of service.

(b) *Service Upon a Natural Person.* Delivery of a copy of a subpoena and tender of fees and mileage to a natural person may be effected by (1) handing them to the person; (2) leaving them at his office with the person in charge thereof or, if there is no one in charge, by leaving them in a conspicuous place therein; (3) leaving them at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; (4) mailing them by registered or certified mail to him at his last known address; or (5) any other method whereby actual notice is given to him and the fees and mileage are timely made available.

(c) *Service Upon Other Persons.* When the person to be served is not a natural person, delivery of a copy of the subpoena and tender of the fees and mileage may be effected by (1) handing them to a registered agent for service, or to any officer, director, or agent in charge of any office of such person; (2) mailing them by registered of certified mail to any such representative at his last known address; or (3) any other method whereby actual notice is given to any such representative and the fees and mileage are timely made available.

§ 12.77 Enforcement of subpoenas.

Upon failure of any person to comply with a subpoena issued at the request of a party, that party may petition the Commission in its discretion to institute an action in an appropriate United States District Court for enforcement of that subpoena.

§ 12.78 Record of hearing.

(a) *Reporting and Transcription.* Hearings for the purpose of taking evidence shall be recorded and shall be transcribed in written form under the supervision of the Administrative Law

Judge by a reporter employed by the Commission for that purpose. The original transcript shall be a part of the record and shall be the sole official transcript. Copies of transcripts, except those portions granted nonpublic treatment, shall be available from the reporter at rates not to exceed the maximum rates fixed by the contract between the Commission and the reporter.

(b) *Corrections.* Any party may submit a timely request to the Administrative Law Judge to correct the transcript. Corrections may be submitted to the Administrative Law Judge by stipulation of the parties, or by motion by any party, and upon notice to all parties to the proceeding, the Administrative Law Judge may specify corrections of the transcript. A copy of such specification shall be furnished to all parties and made a part of the record. Corrections shall be made by the official reporter, who shall furnish substitute pages of the transcript, under the usual certificate of the reporter, for insertion in the official record. The original uncorrected pages shall be retained in the files of the Hearing Clerk.

§ 12.79 Conduct of the Hearing.

(a) *Expedition.* Hearings shall proceed expeditiously and insofar as practicable hearings shall be held at one place and shall continue, without suspension, until concluded.

(b) *Rights of Parties.* Every party shall be entitled to due notice of hearings, the right to be represented by counsel, the right to cross-examine witnesses, present oral and documentary evidence, raise objections, make arguments and move for appropriate relief.

(c) *Examination of Witnesses.* All witnesses at a hearing for the purpose of taking evidence shall testify under oath or affirmation, which shall be administered by the Administrative Law Judge. A witness may be cross-examined by each adverse party and, in the discretion of the Administrative Law Judge, may be cross-examined, without regard to the scope of direct examination, as to any matter which is relevant to the issues in the proceeding.

(d) *Exhibits.* The original of each exhibit introduced in evidence or marked for identification shall be filed and retained in the docket of the proceeding, unless the Administrative Law Judge permits the substitution of copies for the original documents. A copy of each exhibit introduced by a party or marked for identification at his request shall be supplied by him to the Administrative Law Judge and to each other party to the proceeding.

§ 12.80 Evidence.

(a) *Admissibility.* Relevant, material and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable and unduly repetitious evidence shall be excluded.

(b) *Official notice.* (1) Official notice may be taken of:

(i) Any material fact which might be judicially noticed by a district court of the United States; or

(ii) Any matter in the public official records of the Commission.

(2) If official notice is requested or taken of a material fact, any party, upon timely request, shall be afforded an opportunity to establish the contrary.

(c) *Objections.* A party shall timely and briefly state the grounds relied upon for any objection made to the introduction of evidence. If a party has had no opportunity to object to a ruling at the time it is made, he shall not thereafter be prejudiced by the absence of an objection.

(d) *Exceptions.* Formal exception to an adverse ruling is not required. It shall be sufficient that a party, at the time the ruling is sought or entered,

makes known to the Administrative Law Judge the action he wishes the Administrative Law Judge to take or his objection to the action being taken and his grounds therefor.

(e) *Excluded evidence.* When an objection to a question propounded to a witness is sustained, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness, or the Administrative Law Judge may, in his discretion, receive the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

(f) *Affidavits.* Affidavits may be admitted by the Administrative Law Judge only if the evidence is otherwise admissible and the parties agree that affidavits may be used.

(g) *Stipulations.* Stipulations may be received in evidence at a hearing and when received in evidence shall be binding on the parties thereto.

(h) *Official government records.* An official government record or any entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record or by his deputy, accompanied by a certificate that such officer has custody. If the office in which the record is kept is within the United States the certificate may be made by a judge of a court of record in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by any officer in the Foreign Service of the United States stationed in the foreign state or country in which the record is kept and authenticated by the seal of his office. A written statement signed by an officer having custody of an official record or by his deputy, that after diligent search, no record or entry dealing with a specific matter is found to exist, accompanied by a certificate as provided above, is admissible as evidence that the records of his office contain no such record or entry.

(i) *Entries in the regular course of business.* Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, will be admissible as evidence thereof if it shall appear that it was made in the regular course of business by a person who had a duty to report or record it.

§ 12.81 Filing the transcript of evidence.

As soon as practicable after the close of the hearing, the reporter shall transmit to the Hearing Clerk the transcript of the testimony and the exhibits introduced in evidence at the hearing, except such portions of the transcript and exhibits as shall have been delivered to the Administrative Law Judge.

§ 12.82 Proposed findings and conclusions; briefs.

In any proceeding involving a hearing or an opportunity for hearing, the parties may file written proposed findings and conclusions of law. Briefs may be filed in support of proposed findings either as part of the same document or in a separate document. Any proposed finding or conclusion not briefed may be regarded as waived.

(a) *Proposed Findings and Briefs; Time for Filing.* Where the parties file proposed findings and briefs, the following schedule shall apply, unless otherwise determined by the Administrative Law Judge:

(1) *Initial submission.* Proposed findings, conclusions and an initial brief shall be served and filed by the complainant within forty-five (45) days of the close of the hearing;

(2) *Answering submission.* Proposed findings, conclusions, and an answering brief shall be served and filed by the respondents within thirty (30) days after service of the initial conclusions and brief upon the respondents;

(3) *Reply.* A reply brief may be filed by the complainant within fifteen (15) days after service of the answering brief.

(b) *Alternative procedures for submissions.* In his discretion the Administrative Law Judge may lengthen or shorten the periods for the filing of submissions, may direct simultaneous filings, may direct that respondents make the first filing, or may otherwise modify the procedures set forth in § 12.82(a) for purpose of a particular proceeding.

(c) *Briefs.* (1) The initial brief should include:

(i) A short, clear and concise statement of the case;

(ii) Specification of the questions intended to be urged; and

(iii) The argument, presenting clearly the points of fact and law relied upon in support of the position taken on each question.

(2) The answering brief shall generally follow the same style as prescribed for the initial brief but may omit a statement of the case if the party does not dispute the statement of the case contained in the initial brief;

(3) Reply briefs should be limited to rebuttal of matters in the prior briefs.

(d) *Content and form of proposed findings and conclusions.* (1) The findings of fact shall be confined to the material issues of fact presented on the record, with exact citations to the transcripts of record and exhibits in support of each proposed finding.

(2) The proposed findings and conclusions of the party filing initially shall be set forth in consecutively numbered paragraphs and all counterstatements of proposed findings and conclusions shall, in addition to any other matter, indicate which paragraphs of the initial proposals are not disputed.

§ 12.83 Oral arguments.

In his discretion the Administrative Law Judge may hear oral arguments by the parties any time before he files his initial decision with the Hearing Clerk. The argument shall be recorded and transcribed in written form.

§ 12.84 Initial decision.

(a) *When initial decision is required.* The Administrative Law Judge shall make an initial decision in each reparation proceeding in which a hearing has been conducted.

(b) *Content of initial decision.* In his initial decision the Administrative Law Judge shall determine whether or not the respondent has violated any provision of the Act or any rule, regulation or order thereunder. If after a hearing, or upon failure of a respondent to appear at a hearing after being duly notified, the Administrative Law Judge determines that the respondent has violated any provision of the Act, or any rule, regulation, or order thereunder, the Administrative Law Judge shall, unless the respondent has already made reparation to the complainant, determine the amount of damage, if any, to which the complainant is entitled as a result of such violation and shall make an order directing the respondent to pay to the complainant such amount on or before a date fixed in the order.

(c) *Costs.* The Administrative Law Judge may, in the initial opinion, award costs (including the cost of instituting the proceeding, should the complainant prevail) to the party in whose favor a judgment is entered.

(d) *Filing of initial decision and order.* The Administrative Law Judge as soon as practicable after the final

date allowed for filing proposed findings of fact and briefs, or such other time as may be allowed by the Chief Administrative Law Judge, or by the Commission, shall prepare upon the basis of the record and shall file with the Hearing Clerk his decision and order, a copy of which shall be served by the Hearing Clerk upon each of the parties.

(c) *Effect of initial decision.* The initial decision and order shall become the final decision and order of the Commission thirty (30) days after service thereof, except:

(1) The decision shall not become final as to a party who shall have filed an application for review in accordance with § 12.101, pending Commission disposition of the application or, if the application is granted, pending the final decision by the Commission upon review of the initial decision.

(2) The initial decision shall not become final as to any party to the proceeding if, within thirty (30) days after the initial decision, the Commission itself shall have placed the case on its own docket for review or stayed the effective date of the initial decision.

In the event that the initial decision becomes the final decision of the Commission with respect to a party, that party shall be duly notified thereof by the Hearing Clerk. The notice shall state that the time for filing an application for review by the party has expired, that the Commission has determined not to review the initial decision on its own initiative and shall specify the date on which a final order in the proceeding shall become effective as against that party.

Subpart G—Summary Proceedings

§ 12.91 Presiding Officer; evidence.

In all cases in which a hearing is not held, as provided in § 12.71:

(a) A Presiding Officer shall be appointed who is a member of the Commission, an Administrative Law Judge, a Hearing Officer or other such Commission employee as may be appointed by the Commission to conduct the proceeding; and

(b) Proof in support of the complaint and in support of the respondent's answers may be found in those verified documents and may also be supplied in the form of depositions or other verified statements of fact.

§ 12.92 Discovery.

Parties to a summary proceeding may obtain discovery by the methods and in the manner set forth above in §§ 12.62 through 12.66. Copies of all depositions upon written interrogatories and other verified statements obtained through discovery shall be filed in the proceeding by the party on whose behalf the discovery was obtained.

§ 12.93 Submission of evidence.

Each party shall serve and file those depositions and other verified statements of fact upon which he relies in support of his pleadings. Thereafter, the parties shall have fifteen (15) days to file replies to such submitted affidavits or verified statements of fact to which they have not previously replied. All such replies shall be confined to the matters set forth in the affidavits and verified statements of fact to which they are responsive.

§ 12.94 Proposed findings and conclusions; briefs.

The parties may file written proposed findings and conclusions and may file briefs under the same conditions as are set forth in § 12.82 with respect to proceedings involving a hearing or an opportunity for hearing.

§ 12.95 Initial decision.

(a) *When initial decision is required.*

The Presiding Officer shall make an initial decision in each reparation proceeding not involving a hearing or an opportunity for hearing.

(b) *Consent of initial decision.* In his initial decision the Presiding Officer shall determine whether or not the respondents have violated any provision of the Act or any rule, regulation, or order thereunder. If on the basis of the verified pleadings, depositions and other verified documents designated by the parties, the Presiding Officer determines that the respondent has violated any provision of the Act, or any rule, regulation, or order thereunder, the Presiding Officer shall, unless the respondent has already made reparation to the complainant, determine the amount of damage, if any, to which the complainant is entitled as a result of such violation and shall make an order directing the respondent to pay to the complainant such amount on or before a date fixed in the order.

(c) *Costs.* The Presiding Officer may, in the initial opinion, award costs (including the cost of instituting the proceedings, should the complainant prevail) to the party in whose favor a judgment is entered.

(d) *Filing of initial decision and order.* The Presiding Officer as soon as practicable after the final date allowed for filing proposed findings of fact and briefs, or such other time as may be allowed by the Chief Administrative Law Judge, or by the Commission, shall prepare upon the basis of the record and shall file with the Hearing Clerk his decision and order, a copy of which shall be served by the Hearing Clerk upon each of the parties.

(e) *Effect of initial decision.* The initial decision and order shall become the final decision and order of the Commission thirty (30) days after service thereof, except:

(1) The initial decision shall not become final as to a party who shall have filed an application for review in accordance with § 12.101, pending Commission disposition of the application or, if the application is granted, pending the final decision by the Commission upon review of the initial decision.

(2) The initial decision shall not become final as to any party to the proceeding if, within thirty (30) days after the initial decision, the Commission itself shall have placed the case on its own docket for review or stayed the effective date of the initial decision.

In the event that the initial decision becomes the final decision of the Commission with respect to a party, that party shall be duly notified thereof by the Hearing Clerk. The notice shall state that the time for filing an application for review by the party has expired, that the Commission has determined not to review the initial decision on its own initiative and shall specify the date on which a final order in the proceeding shall become effective as against that party.

Subpart H—Commission Review of Initial Decisions in Reparation Proceedings

§ 12.101 Application for Commission review.

Upon application for review by any party or upon its own motion the Commission may, in its discretion, grant review of an initial decision.

(a) *Applications and Responses.* (1) An application for Commission review of an initial decision must be served and filed in accordance with §§ 12.48 and 12.49 within fifteen (15) days after service upon the parties of the initial decision;

(2) An application for review shall (i) identify the party seeking review; (ii) specify the issues presented for review; (iii) identify those provisions of the Act or any rule, regulation or order

thereunder that are relevant to the stated issues; (iv) set forth a concise statement of the facts material to the consideration of the stated issues; and (v) present a concise argument setting forth the reasons why review by the Commission is necessary or appropriate to resolve an important issue of law or public policy.

(3) Any party opposing the application may serve and file a response within fifteen (15) days after service of the application.

(4) An application shall not exceed 30 pages and a response shall not exceed 25 pages, without leave expressly granted by the Presiding Officer.

(5) After the time for the filing of a response has expired the Commission will determine whether to grant a review, based upon the application for review and the response thereto, without oral argument or further written presentation, unless the Commission shall otherwise direct.

(b) *Notice of review.* If the Commission should determine to review an initial decision, the Hearing Clerk shall serve a copy of its order granting review upon each of the parties.

(c) *Scope of review.* Unless the Commission shall otherwise direct, only the issues presented for review as set forth in the application, and all subsidiary issues subsumed therein, will be considered by the Commission.

(d) *Briefs and Appendix to Briefs.* In the event the Commission should determine to review the initial decision, the parties shall file briefs and designate the contents of the appendix in accordance with the procedures set forth in § 10.102 of the Commission's rules of practice: *Provided,* That in reparation proceedings the brief of the party who sought review (or if no party sought review, the brief of the complainant) shall be filed within thirty (30) days after service upon the parties of the Commission's order granting review of the initial decision.

(e) *Oral argument.* Any party may request, in writing and within the time provided for filing the initial briefs, the opportunity to present oral argument before the Commission, which the Commission may in its discretion grant or deny. In the event the Commission affords the parties the opportunity to present oral argument before the Commission, the oral argument shall be in accordance with the provisions of § 10.103 of this chapter.

§ 12.102 The record of proceeding.

If the Commission grants an application for review of an initial decision or the Commission decides on its own initiative to review an initial decision, the record of the proceedings shall be made available to the Commission. The record of the proceeding shall include: The pleadings, motions and requests filed, and rulings thereon; the transcript of the testimony taken at the hearing, together with the exhibits filed therein; any statements or stipulations filed under the summary procedures; any documents or papers filed in connection with prehearing conferences, such proposed findings of fact, conclusions, and orders and briefs as may have been permitted to be filed in connection with the hearing; such statements of objections, and briefs in support thereof, as may have been filed in the proceedings; and the initial decision.

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No. 80-203

In the Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
PETITIONER,
VS.
J.J. CURRAN AND JACQUELYN L. CURRAN,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENTS J.J. CURRAN AND JACQUELYN L. CURRAN

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INTRODUCTION

Respondents are not in disagreement with those portions of petitioner's brief relating to Opinions Below; Jurisdiction and Statutes Involved. Respondents point out, however, that the cause of action in this case accrued prior to May, 1974 and that certain provisions of the Commodity Exchange Act ("CEA"), 7 U.S.C., §§1, *et. seq.*, specifically the customer reparation provisions set forth in CEA §14, are not available to the respondents in the instant case. In the absence of an implied private right of action under the CEA, the respondents will be left without any relief from the petitioner's conduct which is violative of the CEA.

CONCISE STATEMENT OF THE CASE

The petitioner's brief provides an accurate Statement of the Case, except for that portion of the discussion which deals with the specific question presented herein; namely, whether a private cause of action exists under the CEA. For purposes of clarity, a history of the litigation is presented below, but only insofar as it affects the question presented before this Court.

Respondents commenced the instant lawsuit in April, 1976, by filing a complaint for monetary damages in the United States District Court for the Eastern District of Michigan. Count IV of respondents' complaint alleged violations of §§ 5 and 12(2) of the Securities Act of 1933, 15 U.S.C. §§77e, 77 1(2). (JA 17).[1] Count V of the Complaint alleged, *inter alia*, that untrue statements of material facts were made in connection with the offer and sale of securities and commodity futures and that such misrepresentations constituted a fraud and deceit upon respondents. A cause of action was based upon, among others, the Securities Exchange Act of 1934, particularly §15(c)(1) and Rule 10b-5, 15 U.S.C. §78 o (c)(1) and 17 C.F.R. §240.10 b-5, §17 (a) of the Securities Act of 1933, 15

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[1] "JA____" page references are to the Joint Appendix previously submitted to this Court under separate cover.

U.S.C. §77 q (a), and CEA §4, 7 U.S.C. §6. (JA 18). Count VI similarly alleged a device, scheme and artifice to defraud respondents, and a cause of action was likewise alleged under the Securities Act of 1933, the Securities Exchange Act of 1934 and the CEA. (JA 18-19).

On May 24, 1976, petitioner moved to dismiss respondents' complaint. Alternatively, petitioner requested a partial dismissal and a stay of proceedings pending arbitration. Paragraph 2 of petitioner's motion requested that "the Court dismiss, pursuant to Rule 12(b)(6) Fed. R. Civ. P., those allegations of the Complaint purporting to state claims under the Securities Act of 1933 and the Securities Exchange Act of 1934, to wit: Counts IV, V and VI of the Complaint." (JA 24). Significantly, at no time did the petitioner request a dismissal of the respondents' claims under the CEA. On February 23, 1977, the Hon. Thomas P. Thornton ordered "that Counts IV, V and VI of Plaintiff's [Respondents'] Complaint be and the same are hereby dismissed." The District Court then stayed any further judicial proceedings (presumably Counts I, II, III, VII and VIII) pending arbitration of the dispute.

Respondents subsequently sought clarification of the District Court order, specifically, whether Counts IV, V and VI, including claims based upon the CEA, had been dismissed in their entirety. Petitioner opposed any clarification of the District Court order, adopting a position entirely inconsistent with its position before this Court. Specifically, petitioner argued that respondents' complaint alleged violations of the CEA, a claim sufficient to "create federal jurisdiction independent of the Securities Act" (p. 7 of Defendant's [Petitioner's] Memorandum of Law) and to create a sufficient jurisdictional basis for enforcing an arbitration provision. (This arbitration provision was held unenforceable by the Court of Appeals for the Sixth Circuit and this point is not now before this Court). On April 18, 1977, the District Court denied respondents' request for a clarification of its order of dismissal.

Respondents appealed the decision of the District Court, asserting as an issue that their claims under the CEA should not have been dismissed. Contrary to petitioner's statement that this issue was

considered by the Sixth Circuit Court of Appeals "[w]ithout benefit of briefing or argument by the parties" (PB 3),[2] respondents affirmatively urged that a private right of action existed for violations of the CEA. Pages 28-29 of Respondents' brief (RC A-4-5)[3] before the Sixth Circuit Court of Appeals addresses this precise issue:

> The Commodity Exchange Act, 7 U.S.C. Section 1 et seq. (herein the "CEA") prohibits fraudulent acts in connection with the purchase or sale of regulated commodity futures. It is well established that a private cause of action exists for violations of the CEA. *Deaktor v. L. Schreiber & Co.*, 479 F.2d 529 (7th Cir. 1973); *Goodman v. H. Hentz & Co.*, 265 F.Supp. 440 (N.D. Ill. 1967); *Johnson v. Arthur Espey, Shearson, Hammill & Co.*, 341 F.Supp. 764 (S.D.N.Y. 1972). Based on that settled right of action, plaintiffs in Counts V and VI of their complaint charged defendant with engaging in conduct which not only violated provisions of the federal securities laws, but were also violative of provisions of the CEA.
>
> * * *
>
> Plaintiffs are unable to fathom the basis upon which its CEA claims were thus stricken, particularly since defendant did not even request such relief and there is not a shred of authority upon which that dismissal can rest. Nor can plaintiffs understand the refusal by Judge Thornton to amend his order to conform to the pleadings and to the law. Such dismissal of CEA claims and refusal to amend the Court's order are clearly erroneous. They should be reversed by this Court.

On appeal, the Sixth Circuit Court of Appeals construed the District Court's dismissal of Counts IV, V and VI as having granted

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[2] "PB____" page references are to the Brief of the Petitioner filed in the instant case.

[3] "RC____" page references are to the Brief in Opposition to a Writ of Certiorari filed by the respondents in this case. The reference in the text is to the Appendix filed as part of that Petition.

only the relief requested by the petitioner's motion to dismiss. (PC A-23 n. 16).[4] Respondents' claims under the CEA were considered to have survived Judge Thornton's order of dismissal. The Sixth Circuit Court of Appeals then raised *sua sponte* the issue whether implied rights of action under the CEA had survived the extensive 1974 amendments. As the Court of Appeals noted, "an implied right of action was generally thought to exist prior to the 1974 amendment of the Act (CEA)" (PC A-24). After a careful review of the legislative history of the 1974 amendments to the CEA, and after application of the four-pronged test enunciated in *Cort v. Ash*, 422 U.S. 66 (1975), the majority concluded that a private right of action existed for violations of §4b of the CEA. Although this point had never been contested by petitioner at any time during the litigation, a petition for certiorari was filed with this Court to determine whether a private right of action should continue to be implied under the CEA.

SUMMARY OF ARGUMENT

The question presented is whether the CEA implicitly provides a private right of action for a trader of commodity futures contracts against his broker in federal court to recover damages for violations of §4b of the CEA. Although this private right of action is not explicitly conferred by the CEA, it is not necessarily inconsistent with Congressional intent to imply a private right of action. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 16-17 (1979) ("*TAMA*"); *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). Prior to the adoption of the extensive amendments to the CEA called the Commodity Futures Trading Commission Act of 1974 ("CFTCA"), an unbroken string of federal district court decisions, beginning with *Goodman v. H. Hentz & Co.*, 265 F.Supp. 440 (N.D. Ill. 1967), had interpreted §4b of the CEA as creating a private right of action for aggrieved traders. Thus, the issue to be considered by this Court is whether Congress intended to repudiate

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[4] "PC____" page references are to the Petition for a Writ of Certiorari filed by the petitioner in this case. The reference in the text is to the Appendix filed as part of that Petition.

this unanimous interpretation of that section when it adopted the CFTCA.

In *Cort v. Ash, supra*, this Court outlined a preferred approach for determining whether a private right of action should be implied from a federal statute. *California v. Sierra Club*, ____ U.S. ____, 101 S.Ct. 1775, 1778 (1981). The four factors outlined in *Cort* provide criteria through which the ultimate issue of whether Congress intended to create a private remedy can be discerned. *Davis v. Passman*, 442 U.S. 228, 241 (1979). An application of the *Cort* factors in the instant case demonstrates that Congress necessarily intended that a private cause of action would exist under §4b of the CEA.

First, it is obvious that the Currans — as traders in the commodity futures market — fall precisely within that class of individuals which the CEA was amended to protect. The legislative history of the CFTCA evinces an expressed intention to provide traders, and particularly, customers, with full protection under the statute. The very language of §4b of the CEA indicates that commodity futures traders are the precise class of persons for whose *especial* benefit that section was adopted. As accurately observed by Judge Mansfield in his dissent in *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), § 4b can be relied upon only by *customers* who have been defrauded by their own brokers. *Id.* at 331-33. Since the statute itself makes clear that only persons with a direct relationship with a futures broker may complain of a violation of §4b, this first *Cort* test is easily satisfied with respect to the respondents.

Turning to the second and most important of the *Cort* factors, see *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979); *TAMA, supra*, at 15-16; *Northwest Airlines, Inc. v. Transport Workers Union*, ____ U.S. ____, 101 S.Ct. 1571, 1580 (1981); *Universities Research Association, Inc. v. Coutu*, ____ U.S. ____, 101 S.Ct. 1451, 1461 (1981), the ultimate question of Congressional intent must be addressed. Congressional intent not to disturb the private right of action which had been unanimously recognized by the federal courts is amply demonstrated by facts, not conjecture. First, as Congress undertook the formidable revisions of the CEA in 1974, it did so with a clear awareness that the federal courts had in-

terpreted §4b as creating a private right of action. Significantly, most of these cases involved the very types of activities involved in the case *sub judice*, i.e., fraudulent misrepresentations and churning of a customer's account by his broker.[5] The legislative history is replete with references to the existence of judicially implied remedies to redress violations of the CEA. In addition to references by congressmen to the existence of a private right of action, testimony from witnesses, including exchange and industry representatives who explained that customers could take their claims to court, was received. It is highly significant that not a single legislator expressed any opposition to the interpretation of §4b as providing traders with a private right of action against their brokers. Plainly, Congress could have rejected the implication of a private remedy into §4b and definitively precluded private lawsuits as part of the CFTCA, but this it declined to do. *Leist v. Simplot, supra*, at 303. It would have been quite surprising had Congress acted to restrict a pre-existing legal remedy, since the primary thrust of the CFTCA was to *extend* the protection available to commodity futures traders for violations of the CEA. *See* 120 CONG. REC. 9402 (1974) (remarks of Rep. Smith, summarizing the report prepared by the Committee of Agriculture); 120 CONG. REC. 10748 (1974) (remarks of Rep. Throne); *Hearings on S.2485, S.2578, S.2837 and* H.R. 13113 Before the Committee on Agriculture and Forestry, 93d Cong., 2d Sess. 258 (1974) (hereinafter "*1974 Hearings*") (the legislation designed to "close loopholes in federal commodity futures regulation", remarks by Rep. Rodino). Sound principles of statutory construction indicate that when Congress reenacted §4b in the identical language of its predecessor, it thereby adopted the interpretation of that statute placed upon it by the federal courts.

The evidence is overwhelming that Congress assumed and intended that a private cause of action would continue to exist after adoption of the CFTCA. Indeed, the very structure of the CEA, as amended in 1974, is incomplete unless a federal right of action is implied in favor of defrauded investors. For example, the CFTCA established a requirement that exchanges establish a "voluntary" procedure for arbitration of disputes for amounts less than $15,000.

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[5] *Leist v. Simplot*, 638 F.2d 283, 324 (2d Cir. 1980). (Mansfield, J., dissenting)

CEA §5a(11). By requiring the arbitration route to be "voluntary", the statute necessarily presumes an alternate forum for customer-broker disputes. Similarly, by limiting a customer's right to elect arbitration to disputes involving less than $15,000, the statute necessarily presumes the existence of a satisfactory alternative remedy for customers with claims in greater amounts. No such alternative remedy is explicitly provided for the Currans in the instant action, and the statutory framework is simply incomplete on its face without the implication of a private right of action under §4b of the CEA. Reparations, which Congress made available for claims arising on or after January 23, 1975, was not intended to be an exclusive remedy since complete relief is unavailable. For example, no administrative or judicial review is provided for an initial determination by the CFTC that no further action is justified. Similarly, Congress' action in delaying the effective date of the reparations remedy until January 23, 1975, which had the effect of creating three categories of complainants (one category of complainants who, like the Currans, are barred from utilizing reparations) cannot be justified on any rational basis other than that reparations was only intended to *supplement* a right of action in the courts. The legislative history of the CFTCA and the evidence of Congressional intent which can be derived from the statute's very structure, when viewed in the light of the "contemporary legal context," *Cannon, supra*, at 698-99, demonstrates that Congress intended that implied rights of action would exist under the CEA.

Our review of the third factor enunciated in *Cort*, i.e., whether the implication of a private right of action is consistent with the Congressional purpose behind the CFTCA, likewise compels the result that a private right of action exists in favor of futures traders against their own commodities brokers. The case *sub judice* is particularly compelling in that regard. Despite petitioner's repeated emphasis on the theoretical availability of reparations as a satisfactory remedy for the respondents, it cannot fairly be disputed that neither "voluntary" arbitration *nor* reparations are available to the Currans in the instant action. Reparations are available only to causes of action accruing on or after January 23, 1975. CEA §14(i); CFTC Reg. §12.21; *Hornblower & Weeks — Hemphill Noyes, Inc.*

v. Csaky, 427 F.Supp. 814, 817 n.4 (D.C.N.Y. 1977). Since the Currans' accounts were liquidated in April, 1974, the reparations procedure to which petitioner repeatedly points is simply inapposite. Unless a private right of action under the CEA is implied in favor of traders who have been defrauded by their own brokers, the Currans will be left without a federal remedy to redress the petitioner's violations of the federal statute. This would be a most paradoxical result in view of the fact that the CEA was revised for the precise purpose of increasing the protection available to commodity futures traders. COMPTROLLER GENERAL OF THE UNITED STATES REPORT TO THE CONGRESS: INTERIM REPORT ON THE COMMODITY EXCHANGE AUTHORITY AND ON COMMODITY FUTURES TRADING, *reprinted in* 120 CONG. REC. 13944 (1974) (hereinafter "INTERIM REPORT"); Reynolds, *Private Rights of Action for Commodity Futures Investors*, 55 B.U. L. REV. 804, 805-07 (1975) (hereinafter "Reynolds"). The Commodity Futures Trading Commission ("CFTC") has described itself as "an agency with limited resources which are insufficient to permit it to police all commodity-related transactions".[6] The backlog of reparations cases before the CFTC and the fact that common law or state law commodity claims can still be brought before the federal courts through diversity jurisdiction indicate Congress' intention that providing protection to investors would best be served by implication of a private remedy. In the words of this Court in *Cannon, supra*, an implication of a private remedy in favor of the Currans "is necessary or at least helpful to the accomplishment of the statutory purpose."[7]

Finally, the fourth factor enunciated in *Cort, i.e.*, whether the cause of action is one traditionally relegated to state law, so that implication of a private remedy would be inappropriate, can be quickly answered in the negative. The exclusive jurisdiction granted to the Commodity Futures Trading Commission and the CEA (and regulations promulgated thereunder) was intended to pre-empt any attempt by the states to regulate trading of commodity futures. As

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[6] The quoted language is from page 34 of an *amicus brief* filed by the Commission before the Second Circuit Court of Appeals in the case of *Leist v. Simplot*, *supra*, at 321.

[7] *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979).

stated by the JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE ON H.R. 13113, 120 CONG. REC. 33042 (1974): "In view of the broad grant of authority to the Commission to regulate the futures trading industry, the Conferees do not contemplate that there will be a need for any supplementary regulation by the States." The active involvement of the federal government in futures trading since 1922 and the pre-emption of state regulation of this area clearly indicates that implication of a federal remedy is not inappropriate.

Under the standards for implication of private remedies set forth in *Cort* and in the subsequent decisions of this Court, the unique circumstances present in the case *sub judice* are sufficiently compelling to warrant the implication of a private cause of action in favor of the Currans. The complete overhaul of the CEA in 1974 was undertaken with the knowledge of Congress that a private right of action had been consistently recognized for violations of CEA §4b.[8] Despite the explicit civil and criminal penalties which may be imposed against a futures commission merchant, such as petitioner, the Currans will find themselves faced with "a complete failure of alternative enforcement mechanisms," *Cannon, supra,* at 739 (Powell, J., dissenting). To prevent petitioner's statutory duty towards its customers from becoming merely precatory, some means for enforcing this duty is necessary. The implication of a private right of ac-

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[8] The situation in the instant case is thus analogous to the judicial history of the various provisions of the Railway Labor Act of 1926 which were held enforceable in federal court. As explained in Justice Powell's dissenting opinion in *Cannon, supra,* at 733-34, Congressional amendments to that statutory scheme were perceived as indicative of implicit approval of this Court's implication of a federal remedy for violations of that statute, which in turn supported implication of additional federal remedies under that Act. A federal remedy had been implied for violations of the CEA since 1967, and Congress indicated approval of these judicial decisions when it amended the CEA in 1974. The fact that this implication had manifested itself only in decisions of lower federal courts is not a controlling distinction where, as here, the federal courts had spoken with a unanimous voice. Consider, for example, this Court's acceptance of the 25-year-old implication of a private right of action for violations of Rule 10b-5 in *Superintendent of Insurance of New York v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971).

tion in favor of the Currans is necessary for the preservation of their rights under the federal statute.

ARGUMENT

APPLICATION OF THE *CORT v. ASH* ANALYSIS COMPELS THE CONCLUSION THAT THERE IS A CONTINUED PRIVATE RIGHT OF ACTION UNDER SECTION 4b OF THE CEA.

In *Cort v. Ash, supra*, this Court listed four factors from which it could be determined whether a private right of action should be inferred from a federal statute not explicitly providing such a remedy.[9] These factors, while fairly simple to enunciate, have proven considerably more difficult to apply in any particular context.[10] The ultimate inquiry, of course, is whether Congress intended to create a private right of action.[11] Even though imprecise, each aspect of the *Cort* analysis is significant in that it provides an objective criterion through which the Congressional intent can be ascertained.[12] Although "the so-called *Cort* factors are merely guides in the central task of ascertaining legislative intent, . . . they are not of equal weight, . . . and . . . courts need not mechanically trudge through all four of the factors when the dispositive question of

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[9] "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S. at 78 (citations omitted).

[10] *See, e.g., Cannon, supra*, at 741-42 (Powell, J., dissenting).

[11] *See California v. Sierra Club, supra*, at 1779; *Universities Research Ass'n v. Coutu*, ___ U.S. ___, 101 S.Ct. 1451, 1461 (1981); *TAMA, supra*, at 23-24; *Touche Ross & Co. v. Redington, supra*, at 568, 575-76.

[12] *California v. Sierra Club, supra*, at 1785 (Stevens, J., concurring).

legislative intent has been resolved",[13] an analysis of each of the four *Cort* factors is necessary where, as here, each factor points overwhelmingly to the necessity for the continued implication of a private right of action under §4b of the CEA.

I.

SECTION 4b OF THE CEA WAS ENACTED FOR THE ESPECIAL BENEFIT OF COMMODITY FUTURES TRADERS.

It is virtually self-evident from the statute that traders on the commodity futures markets, such as the Currans in the instant case, fit precisely within the class of persons for whose especial benefit §4b of the CEA was enacted. The legislative history of the CFTCA is replete with references to the need to protect the unsophisticated trader in commodity futures. *1974 Hearings* at 225 (remarks of Tom Maher); H.R. REP. NO. 975, 93d Cong., 2d Sess. 36-39 (1974); 120 CONG. REC. 9402 (1974) (remarks of Rep. Smith); 120 CONG. REC. 10748 (1974) (remarks of Rep. Throne); 119 CONG. REC. 5642 (1973) (remarks of Sen. Clark). The Sixth Circuit Court of Appeals in the instant case found that this first *Cort* element was "easily satisfied" and that investors in the commodities markets were "clearly" within the class for whose especial benefit the statute was enacted. (PC A-30). In *Rivers v. Rosenthal & Co.*, 634 F.2d 774 (5th Cir. 1980), a case which involved a private suit under CEA §4b by commodity futures customers against their brokers, the defendants chose not to dispute the applicability of the first *Cort* factor. *Id.* at 782, n. 13. Even §206 of the Investment Advisers Act of 1940, 15 U.S.C. §80b-6, a statute petitioner describes as the statutory counterpart of CEA §4b (PB 19), was held by this Court to have been enacted for the *especial* benefit of an investment adviser's *customers*, *TAMA*, *supra*, at 17, the obvious statutory counterpart to the trading customers of a futures commission merchant under the CEA. Indeed, the specificity of the statute undermines any at-

[13] *Id.* at 1783 (Concurring opinion of Justices Rehnquist, Burger, Stewart and Powell).

tempt to argue that §4b was not enacted for the *especial* benefit of commodity futures traders.

Section 4b of the CEA, the statutory provision upon which respondents rely in the instant action, provides in pertinent part as follows:

> It shall be unlawful (1) for any member of a contract market . . . in or in connection with any order . . . for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery . . . for or on behalf of any other person . . .
>
> (A) to cheat or defraud or attempt to cheat or defraud *such other person;*
>
> (B) willfully to make or cause to be made to *such other person* any false report or statement thereof, or willfully to enter or cause to be entered for *such person* any false record thereof;
>
> (C) willfully to deceive or attempt to deceive *such other person* by any means whatsoever in regard to any *such* order or contract or the disposition or execution of any such order or contract, or in regard to *any act of agency* performed with respect to such order or contract *for such person*; or
>
> (D) to bucket *such order*, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of *such person* to become the buyer in respect to any selling order of *such person*, or become the seller in respect to any buying order of *such person*. (Emphasis added).

As emphasized in the dissenting opinion of Judge Mansfield in *Leist v. Simplot, supra*, at 332, only the person on whose "behalf" a contract is made is protected by §4b from fraud and deceit on the part of the exchange member who is making that contract. The "person" is the customer for whom the futures contract is made. The introductory paragraph defines the subject matter of the action

in terms of a "contract of sale . . . for or on behalf of any other person." Subsections (A), (B), (C) and (D) then limit the prohibited activities to certain forms of fraud by the broker upon "such other person" (*i.e.*, his customer) or in relation to "such order." A violation of §4b can occur *only* when a member of a contract market, such as the petitioner in the instant case, cheats or defrauds his own customer.[14]

The preceding analysis underlines the specific thrust of §4b and rebuts the petitioner's inaccurate assertions that the anti-fraud provisions of §4b are "broad" and "proscribe, in essence, cheating or defrauding by 'any person', of any 'other person' in connection with commodity futures transactions." (PB 25). As stated in *Berman v. Bache, Halsey, Stuart, Shields, Inc.*, 467 F.Supp. 311, 322 (S.D. Ohio 1979), a case which ultimately decided against implication of a private right of action under the CEA:

> First, there is little question that the plaintiff is a member of the class for whose "especial" benefit the statute was enacted. Indeed, 7 U.S.C. Section 6b is so concerned with the protection of the purchaser of commodities futures contracts that it creates liability for fraud only on the part of members of a contract market or one who makes a sale on behalf of any other person (i.e., a purchaser). There is no provision proscribing fraud on the part of the purchaser in 7 U.S.C. Section 6b. It is also felt that the 1974 amendments were largely motivated by a desire to protect the less sophisticated general investor who was becoming increasingly involved in the trading of commodities futures. *See* Schief & Markham, *The Nation's "Commodity Cops" — Efforts by the Commission to Enforce the Commodity Exchange Act*, 34 Business Law. 19 (Nov., 1978) and the legislative history cited therein. The Court is therefore of the opinion that the first factor of the analysis . . . favors the implication of a private cause of action.

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[14] *Leist v. Simplot*, 638 F.2d 283, 331-33 (2d Cir. 1980) (Mansfield, J., dissenting).

In its brief before this Court, petitioner avoids an analysis of the precise statutory language contained in §4b. Instead, petitioner diverts attention from the proper statutory analysis by a misplaced assertion that the CEA, taken as a whole, was not enacted for the especial protection of any particular class. (PB 23-26). Particular emphasis is placed by petitioner on the jurisdictional language contained in §3 of the CEA. Petitioner's argument is wide of the mark for two reasons. First, the historical context of §3 indicates that its sole purpose was to provide a constitutional basis upon which the CEA could be sustained. The first Congressional attempt to regulate commodity futures trading was the Future Trading Act, 42 Stat. 187 (1921), which not only regulated such trading but also imposed a tax on all grain futures contracts not traded on a designated contract market. This statute was subsequently held by this Court to be an unconstitutional exercise of the taxing power. *Hill v. Wallace*, 259 U.S. 44, 66-67 (1922). The statute was immediately redrafted as The Grain Futures Act, 42 Stat. 998 (1922), the taxing power was deleted, and the predecessor to §3 of the CEA was enacted. The stated purpose behind the addition of §3 was to provide a sufficient basis for this Court to conclude that the Act was within the power of Congress to regulate interstate commerce,[15] a fact expressly recognized by this Court later that same year, when the constitutionality of the Act was upheld. *Board of Trade v. Olsen*, 262 U.S. 1, 31-33 (1923). Second, the legislative history of §4b, which can be traced as far back as 1934, refutes petitioner's contention that it was not enacted for the especial benefit of persons such as the Currans in the instant case. The fact that §4b affords protection only to the *customer* of a commodity futures broker has been repeatedly recognized. *See*, for example, H.R. REP. NO. 1637, 73d Cong., 2d Sess. 5 (1934) ("Section 4b prohibits traders in acting *for customers*

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[15] *See* 62 CONG. REC. 9404 (June 26, 1922) (remarks of Chairman Tincher of the House Committee on Agriculture: "We have defined interstate commerce, using the language of the Supreme Court, as applying to grains and this law will not apply to any transaction except interstate transactions as defined by the court."); *id.* at 12723 (Sept. 15, 1922) (The Court "called attention to the fact that if grain was in interstate commerce we could reach the situation in this bill; and this bill is strictly following the dictation . . . of the Supreme Court . . .").

in futures transactions to cheat, defraud, or deceive *customers*") (emphasis added); H.R. REP. NO. 421, 74th Cong., 1st Sess. 5 (1935) ("Section 4b makes it unlawful for members of contract markets . . . to cheat, defraud, or deceive *the customer*") (emphasis added); 113 CONG. REC. 23652 (Aug. 22, 1967) (testimony of Assistant Secretary of Agriculture Mehrens that the "proposed legislation . . . would . . . give *customers* who deal in commodity futures with nonmembers the full protection of the Act") (emphasis added).[16]

Furthermore, there is ample evidence that the massive amendments to the CEA in 1974 were motivated by a desire to protect all traders on the commodity futures markets, whether that trader was classified as a hedger or as a speculator.[17] As stated in Reynolds, *supra*, at 807, the 1974 Congress "amended the CEA in response to charges that existing legislation was inadequate to protect individuals trading on the commodities markets." Of particular concern to the 1974 Congress was the fact that investors in nonregulated commodities markets were not protected by the existing legislation, *see* INTERIM REPORT, *supra*; *1974 Hearings* at 225 (statement of Tom Maher); *Hearings Before the House Committee on Agriculture for a Review of Commodity Exchange Act and Discussion of Possible Changes*, 93d Cong., 1st Sess. 79 (1973) (hereinafter "*1973 Hearings*") (statement of Joel Bellows, Esq. that "a substantial part of my practice . . . is the representation of investors and speculators who have been bilked and cheated by bandits operating in and on the periphery of the commodities markets"); *1973 Hearings* at 11 (remarks of Rep. Smith that the investing public lost over 100 million dollars in a scheme of selling puts and calls in nonregulated commodities), and that the existing regulatory authority needed to be strengthened in order to protect investors.

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[16] In accord with the statements in the text is *Chisper v. Kohmeryer & Co.*, 600 F.2d 1061, 1065 n. 7 (5th Cir. 1979) ("Section 4b makes it unlawful for a commodities broker to 'cheat or defraud' a *customer* or willfully to deceive or make false statements or reports to a *customer* in connection with transactions on the commodities exchange.") (emphasis added).

[17] This aspect of the legislative history of the CEA is examined in more detail in *Leist v. Simplot*, *supra*, at 304-07.

1974 Hearings at 366 (statement of Judy Jackson which refers to the "regulatory failure of the [CEA] . . . which have been detailed in a series of pioneering articles in the 'Des Moines Register' and most recently in a May 5, 1974 GAO report on the CEA"); *1974 Hearings* 438 (statement of Joseph J. Bianco, Yale Legislative Services); *1974 Hearings* at 371 (remarks of Sen. Humphrey, sponsor of S.2485).

Section 4b of the CEA is unlike the statute analyzed by this Court in *California v. Sierra Club, supra*, which the petitioner claims to be "dispositive" of this issue. (PB 25). In *Sierra Club*, a private lawsuit was brought by an organization which represented the general public, which is hardly a precise enough class of plaintiffs to warrant treatment as *especial* beneficiaries under the statute then in question. By contrast, however, the proscriptions of §4b prohibit conduct towards an extremely limited class of individuals, *i.e.*, a broker's *customers*, and it appears axiomatic that such *customers* are the very class of persons for whose *especial* benefit §4b of the CEA was enacted. In this case, the first *Cort* factor must clearly be resolved in favor of the respondents.[18]

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[18] The other cases cited by petitioner to support its position that no cause of action should be implied under §4b of the CEA are simply inapposite, because the statutes construed in those cases were not enacted for the benefit of any *especial* class. For example, in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), *cited in* PB 4, 21-22, this Court held that the explicit provisions of the Freedom of Information Act (FOIA), 5 U.S.C. §552, had not been violated, *id.* at 150, and so the only statutes which conceivably could have supported the private right of action were the Federal Records Act of 1950, 44 U.S.C. §§2901 *et seq.* and the Records Disposal Act, 44 U.S.C. §3314, which can scarcely be argued to have been enacted for the *especial* benefit of persons requesting information under FOIA. In *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, ___ U.S. ___, 101 S. Ct. 2615 (1981), *cited in* PB 21, 27-28, 31, the statutes provided an explicit civil remedy for "any person" who followed the requirements of those statutes. *Id.* at 2620 n. 11, 2623-24. No private right of action beyond that explicit in the statute was provided, which is hardly surprising since the statutes involved, the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§1251 *et seq.* and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§1401 *et seq.*, were designed to regulate

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II.

EXPLICIT AND IMPLICIT INDICATIONS OF LEGISLATIVE INTENT SHOW THAT CONGRESS INTENDED FOR A PRIVATE RIGHT OF ACTION TO BE AVAILABLE UNDER SECTION 4b.

Turning to the second and most important of the *Cort* factors, *Touche Ross & Co. v. Redington, supra*, at 575, our inquiry focuses on whether there is any indication of legislative intent, explicit or implicit, either to create a private remedy or to deny one. *Cort v. Ash, supra*, at 78.

At the outset, reference must be made to the judicial climate in which the 1974 revisions to the CEA occurred. At the time the CEA was amended in 1974, it was the unanimous interpretation of the federal courts that §4b of the CEA afforded a private remedy for

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the dumping of materials into the ocean and to regulate water pollution, and were not designed for the *especial* benefit of any class of persons. In *Northwest Airlines, Inc. v. Transport Workers Union, supra, cited in* PB 21, 27, 38, the plaintiff who argued for the implication of a private remedy was a member of the very class which Congress sought to regulate and could "scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection." *Id.* at 1581. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), *cited in* PB 4, 19, 21, 23, 26, 31-32, held that no private right of action existed for violations of §17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a), described as simply a reporting statute which "neither confers rights on private parties nor proscribes any conduct as unlawful." *Id.* at 569. Finally, the case most heavily relied upon by petitioner, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), *cited in* PB 4, 15-16, 19-23, 25-27, 32, concluded that the plaintiff was a member of the precise class for whose *especial* benefit the statute had been enacted, 444 U.S. at 17, but the Court also concluded that a private right of action — specifically, the right to seek rescission in federal courts — was implicitly provided to such plaintiffs. *Id.* at 18-19.

commodity futures traders against their own brokers.[19] As noted by this Court in *Cannon, supra*, at 698-99, "our evaluation of congressional action . . . must take into account its contemporary legal context." The circumstances of the 1974 amendments to the CEA are extremely analogous to those circumstances analyzed by this Court in *Cannon, supra*. In that case, this Court was faced with the task of determining whether the specific remedy provided by Title IX of the Education Amendments of 1972 precluded an implied cause of action for a victim of prohibited discrimination. The language construed in *Cannon* was identical to that found in Title VI of the Civil Rights Act. As this Court noted, "when Title IX was enacted, the

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[19] Prior to 1974, it was undisputed that a private right of action existed for violations of the CEA. The first case expressly to hold that a private right of action existed in favor of a futures trader against his broker was *Goodman v. H. Hentz & Co., supra*. The district court in *Goodman* implied a private right of action, primarily on the "tort" theory espoused in *Kardon v. National Gypsum Co.*, 69 F.Supp. 512 (D.C. Pa. 1946). Significantly, the *Goodman* case involved violations of §4b of the CEA, the very provision involved in the instant controversy.

Reasoning from *Goodman*, an unbroken line of cases likewise implied a private right of action under the CEA, generally based upon little more than a citation to *Kardon, Goodman* and their progeny. *Anderson v. Francis I. duPont & Co.*, 291 F.Supp. 705, 710 (D.C. Minn. 1968) (investors claiming inducement into fraudulent commodities investment scheme); *Booth v. Peavey Co. Commodity Services*, 430 F.2d 132, 133 (8th Cir. 1970) (churning, violation of CEA §4b(A)); *United Egg Producers v. Bauer International Corp.*, 311 F.Supp. 1375, 1384 (S.D.N.Y. 1970) (injunction granted against violations of CEA §9(b)); *McCurnin v. Kohlmeyer & Co.*, 340 F.Supp. 1338, 1343 (E.D. La. 1972) (private right under CEA §4b(B) since "such a cause of action has been repeatedly recognized"); *Arnold v. Bache & Co., Inc.*, 377 F.Supp. 61, 65 (M.D. Pa. 1973) (fraud perpetrated by FCM against his customer); *Hecht v. Harris, Upham & Co.*, 283 F.Supp. 417, 437 (N.D. Cal. 1968), *modified* 430 F.2d 1202 (9th Cir. 1970); *Gould v. Barnes Brokerage Co., Inc.*, 345 F.Supp. 294, 295 (N.D. Tex. 1972); *Seligson v. New York Produce Exchange*, 378 F.Supp. 1076, 1084 (S.D. N.Y. 1974), *aff'd sub nom. Miller v. New York Produce Exchange*, 550 F.2d 762 (2d Cir.), *cert den.* 434 U.S. 823 (1977). Significantly, not a single pre-1974 decision denied that a private remedy was available to redress violations of the CEA. This Court even had the opportunity to address this issue tangentially, dealing with the doctrine

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critical language in Title VI *had already been construed* as creating a private remedy ... repeatedly cited with approval and never questioned during the ensuing five years." *Cannon, supra*, at 696 (emphasis added). Similarly, for a period of seven years prior to the 1974 revision of the CEA, the anti-fraud provisions contained in §4b of the CEA had been construed as creating a private remedy. As noted by the concurring opinions of Justices Rehnquist and Stewart, the judicial climate of that time "gave Congress good reason to think the federal judiciary would undertake this task." *Id.* at 718. The circumstances surrounding the enactment of the CFTCA make these observations in *Cannon* even more compelling in the case at bar.

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of primary jurisdiction. In *Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113, 115 (1973), this Court stated that "the *Deaktor* plaintiffs, who alleged violations of the Commodity Exchange Act and the rules of the Exchange, should be routed in the first instance to the agency whose administrative functions appear to encompass adjudication of the kind of substantive claims made against the Exchange in this case." The obvious implication of this Court's decision was that a determination by the Commission "in the first instance" would assist a judicial resolution of plaintiff's claims "in the second instance." *Leist v. Simplot, supra*, at 301.

In addition to the foregoing cases, each of which was decided before the 1974 amendments here in issue, several cases decided on pre-1974 facts after the 1974 amendments continued to uphold the existence of a private right of action under the CEA. *Case & Co., Inc. v. Board of Trade*, 523 F.2d 355 (7th Cir. 1975); *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8 (7th Cir. 1977) ("[p]rivate damage actions are allowable under the CEA"); *Bartley v. P.G. Commodities Associates, Inc.*, [1975-1977] COMM. FUT. L. REP. (CCH) ¶20,123 (S.D.N.Y. 1975). Although more recent cases have been divided on the issue whether private rights of action should continue to be implied under the CEA in light of the recent decisions of this Court, *see Leist v. Simplot, supra*, at 302 n. 19, it cannot be denied that such rights of action were universally recognized in 1974. Perhaps the most persuasive evidence of this belief is that petitioner, when this case was argued before the Sixth Circuit Court of Appeals, never disputed the Currans' position that "a private cause of action exists for violations of the CEA." (RC A-4-5).

The adoption of the CFTCA represented "the first complete overhaul of the Commodity Exchange Act since its inception", H. R. REP. NO. 93-975, *supra*, at 1; *1974 Hearings* at 768 (statement of American Cotton Shippers Ass'n). Because the 1974 revision represented such a "complete overhaul", it has been recognized by every court to consider this issue that the relevant legislative intent must relate to the 1974 revision. *Rivers v. Rosenthal & Co.*, *supra*, at 782. This is true even though the predecessor to §4b (the anti-fraud provision at issue in this case) was enacted as long ago as 1936, since "the overall 'regulatory scheme as it exists today is a product of the 1974 amendments'". *Id.* at 783, *citing Navigator Group Funds v. Shearson Hayden Stone, Inc.*, 487 F.Supp. 416, 420 & n.6 (S.D.N.Y. 1980). Accordingly, the re-enactment of §4b in the identical language of its predecessor, with full knowledge of the interpretation the courts had given to that language, under the then existing judicial climate, is a compelling indication that Congress did not intend to overrule that interpretation. *See* the opinion of the Court below, at PC A-31, n. 27 and cases cited therein.

It cannot seriously be doubted that Congress was very much aware that private rights of action had been implied by the federal judiciary for violations of the CEA. Representative Poage, the sponsor of H.R. 13113, which eventually was adopted as the basis for the 1974 revisions to the CEA, introduced his bill with the statement that the "courts implied a private remedy for individual litigants in the Commodity Exchange Act". 119 CONG. REC. 41333 (1973). Although it is true, as petitioner points out, that Rep. Poage was concerned that the existence of private remedies against the *exchanges themselves* might be having a perverse effect upon the regulatory scheme, in that the exchanges were being advised by their counsel not to adopt rules for the protection of their customers to forestall private litigation in the event such rules were not enforced, *id.*; *see also* PB29, and that similar sentiments were expressed by other lawmakers, H. R. REP. NO. 93-975, *supra*, at 46; 120 CONG. REC. 10748 (1974) (remarks of Rep. Throne), it is significant that not a single legislator expressed disapproval of the existence of a private right of action by investors, such as the Currans, against *their own brokers*. In the face of the universal recogni-

tion that such private rights of action existed, the failure of any legislator to criticize the effects of such private remedies is highly significant. The remarks of Reps. Poage and Throne cited to above indicate an awareness that a private right of action existed under the CEA, and neither legislator made the slightest suggestion that implicit private remedies for a customer against his broker were unfounded or should in any way be curtailed.

Petitioner suggests that the opinions of Judges Friendly and Mansfield in *Leist v. Simplot, supra*, and of Judge Reavley in *Rivers v. Rosenthal & Co., supra*, along with the briefs filed by persons in support of the implication of a private remedy under the CEA, indicate a lack of any *persuasive* evidence of Congressional intent to imply a private right of action. (PB28). On the contrary, although much of the Congressional debate was concerned with such issues as the independence of the Commodity Futures Trading Commission, whether the commissioners should serve full- or part-time, whether dual trading of brokers for their own accounts and for their customers should be allowed, and the extent of injunctive power which should be vested with the Commission, *see 1974 Hearings* at 371-73 (statement of Sen. Humphrey), it can not be seriously disputed that: (1) *every* federal court to consider the issue prior to 1974 had determined that a private right of action existed under the CEA; (2) Congress was plainly aware of such judicial decisions; (3) not a single legislator criticized the implication of a private remedy on behalf of a customer against his broker; (4) no provision was enacted which would restrict access to the courts to private litigants; and (5) the remedies explicitly provided by the CEA cannot be harmonized without the implication of a private right of action for aggrieved traders, such as the Currans in the instant case. The inescapable conclusion is that the 1974 Congress plainly intended that a private right of action would exist for violations of §4b of the CEA on behalf of a customer against his broker. Point (1) has been adequately addressed in n. 19, *supra*, and points (3) and (4) can be proven by a complete reading of the voluminous hearings and committee reports issued in connection with the 1974 amendments. Thus, Part II-A considers point (2) above, *i.e.*, whether the 1974 Congress knew that private remedies had been judicially implied under the

CEA and Part II-B considers point (5) above, *i.e.*, the necessity for private remedies to continue under the statutory scheme. Finally, Part II-C responds to specific issues raised in petitioner's brief with regard to the 1978 amendments to the CEA.

A. The Legislative History of the CFTCA Indicates that Congress Was Aware of and Approved the Judicially Implied Private Right of Action Under Section 4b of the CEA.

In addition to the remarks of Reps. Poage and Throne referred to above, the legislative hearings surrounding the 1974 amendments to the CEA are replete with references to the existence of a private cause of action. Testimony received on behalf of the commodity exchanges should have made it perfectly clear to any legislator that a private right of action existed to redress violations of the CEA. For example, Alvin W. Donahoo, Executive Vice President of the Minneapolis Grain Exchange, furnished the following written response to the Senate committee:

> QUESTION 8. Why limit customer claims to $5,000 or $10,000 if the exchanges are working legally, efficiently and equitably?
>
> ANSWER. We believe that if a customer has a claim in excess of $10,000, he should hire an attorney to make certain that all facts are presented. We are advised by our counsel that *facts in large claims can best be established through the discovery procedure envisioned in the Federal Rules of Civil Procedure in the Federal court*. For these reasons, we believe that customer claims should be limited to $10,000 and *claims in excess of that amount should be decided by the courts*.

1974 Hearings at 403 (emphasis added). Mr. Donahoo's oral testimony was consistent with his written statement, as he favored a market-sponsored claim procedure for more modest claims, since the small size of such claims serves as an "economic impediment to Court litigation". *1974 Hearings* at 415. It is significant that the

1974 legislation contained a provision requiring exchanges to provide for "voluntary arbitration" of customer claims not in excess of $15,000. CEA §5a(11). Such provision, as evidenced by use of the word "voluntary" and the testimony of Mr. Donahoo, was enacted for the purpose of providing an alternative remedy to costly court litigation for private litigants with moderate claims. *See also* [1975-1977] COMM. FUT. L. REP. (CCH) ¶20,111, "Arbitration Or Other Dispute Settlement Procedures: Amendment of Prior Proposed Rules" (November 18, 1975), in which the CFTC recognized the Congressional intent behind this arbitration provision was to permit the expeditious handling of smaller claims and that larger claims generally required the "safeguards available in a court of law".

Frederick G. Uhlmann, Chairman of the Board of the Chicago Board of Trade, expressed sentiments similar to those of Mr. Donahoo. In response to a direct inquiry regarding the desirability of an administrative appeal from customer settlement procedures established by the exchanges, Mr. Uhlmann noted that "*it would eliminate much risk of litigation by persons* who are *either ordered to make adjustment* or are *denied adjustment*" and favored an appeals procedure for customer claims in excess of some minimum amount such as $2,500. *1973 Hearings* at 131-32 (emphasis added). Mr. Uhlmann noted that unless the customer was bound by the arbitration award, "obviously he will take every adverse decision to the Commission or to the courts". *1974 Hearings* at 524. References to private rights of action were also made by Reed Clark, representing the New York Coffee and Sugar Exchange. According to Mr. Clark, exchange determinations of customer complaints "*can be reviewed by the courts*, and to interpose a government agency between any exchange and the courts would serve only to add another appellate level — with resultant expense and delay — to disputes between customers and exchange members". *1973 Hearings* at 119 (emphasis added). Charles W. Chapin, also a representative of the New York Coffee and Sugar Exchange, prophetically testified that the provision for reparations "would cause jurisdictional confusion as to the interrelationship between the arbitration procedures afforded by the contract markets, the complaint mechanism of the Commis-

sion and the judicial relief available through the courts." *Hearings on H.R. 11955 Before the House Committee on Agriculture*, 93d Cong., 2d Sess. 249 (1974) (hereinafter "*H.R. 11955 Hearings*"). Michael Weinberg, Jr., Chairman of the Board of the Chicago Mercantile Exchange, testified that, if a customer has a complaint which is not satisfactorily resolved through administrative processes, "*of course, there is the ultimate opportunity of recourse to the courts*". *1973 Hearings* at 198 (emphasis added). David T. Johnston, Senior Vice President and Director of E. F. Hutton, criticized the concept of voluntary arbitration on the grounds that "if the individual doesn't agree with the arbitration, he can then initiate proceedings in the courts to reopen the matter". *1974 Hearings* at 674. Because resort to the courts was already available, William F. Brooks, President and General Counsel of the National Grain Trade Council, questioned whether the proposed reparation procedures would prevent any mischief. *H.R. 11955 Hearings* at 52. Warren W. LeBeck, President of the Chicago Board of Trade, summarized the rules of that exchange as follows:

> The Board of Trade established several years ago a review committee to which customer complaints could go and we have in addition an appeals committee above and beyond that and *the customer, of course, still has access to the courts*.
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> * * *
>
> [I]n our rules, for example, we have both an arbitration committee and an appeals committee, so there is a review of this matter, and then, *of course*, if there are allegations that there has been conspiracy or fraud or deceit, *they can go to court*. . . .

1974 Hearings at 526 (emphasis added). Paul H. Franklin, representing Merrill Lynch, Pierce, Fenner & Smith, the petitioner herein, testified that if arbitration was unacceptable to his firm's customers that "the matter could be referred to courts". *H.R. 11955 Hearings* at 331. In fashioning the structure and limited availability of the remedies of arbitration and reparations, Congress must be presumed to have relied upon the testimony of the exchange offi-

cials that a private right of action was available to an aggrieeved trader.

The legislators were also reminded by individuals other than exchange representatives that private remedies existed under the CEA. For example, the INTERIM REPORT, *supra*, summarized the plight of a customer trading in a nonregulated commodity who alleged that his broker had defrauded him and who had "exhausted all possible sources of assistance, *except legal action*, without gaining any satisfaction" (emphasis added). A bitter letter addressed to Sen. Hansen exposed the fraudulent tactics used by the commodity exchange to require liquidation at a depressed price when an unwary rancher purchased future contracts with the intention of accepting delivery of the cattle. The letter concluded with the remarks that "I recognize that I have to take appropriate legal action to protect myself". *1974 Hearings* at 788. Numerous articles initially published in the Des Moines Register indicate a general public awareness that private remedies were available to redress violations of the CEA. *See particularly* 119 CONG. REC. 5642 ("only recently have a few victims begun to strike back by filing lawsuits demanding repayment of money they have lost in alleged price manipulation schemes"); *id.* at 5644 (lawsuits by producers and commodity traders for $2,000,000 in damages); *id.* at 5649-50 (summary of the lawsuits filed by Bernard Rosee, which ultimately resulted in a judgment of $700,000). Alex Caldwell, Director of the Commodity Exchange Authority, discussed the problem of defaults on forward contracts by stating that "[l]awsuits are the only way you can handle it now". *1974 Hearings* at 251. Joel Bellows, a practicing attorney, testified that a substantial part of his practice was "the representation of investors and speculators who have been bilked in and cheated by bandits operating in and on the periphery of the commodities markets". *1973 Hearings* at 79. Dr. Roger W. Gray, Professor of Law at Stanford University, provided the following example of churning:

> An attorney, a firm of attorneys that had a client that they thought they had wanted to defend who was a future commission brokers, *and suit had been brought against him by his customers*, and it turned out that they

> had a $10,000 account and in 6 months they had lost $17,000. They lost their $10,000 plus seven more. And in those 6 months this man had earned $38,000 commission off of that $10,000 account.

1974 Hearings at 283.

In addition to the foregoing statements, the legislators themselves expressly indicated their belief that recourse to the federal courts was available to private litigants to redress violations of the CEA. Rep. Throne, for example, stated that the 1968 amendments to the CEA had implicitly granted private parties the right to sue the exchanges for nonenforcement of their rules designed to protect investors. 120 CONG. REC. 10748 (1974). Rep. Poage observed that "when the [CEA] was enacted, courts implied a private remedy for individual litigants in the [CEA]". 119 CONG. REC. 41333 (1973). Sen. Clark, in construing §4b — the precise statute involved in this lawsuit — stated that it "simply tries to convey the idea that it is unlawful for any person to cheat or defraud another person." *1974 Hearings* at 687. Professor Glenn Willet Clark, in response to the Senator's observation, then suggested that "a *cleaner approach* would be to use verbatim the language from the SEC's present rule 10b-5, incorporate that in the Act." *Id.* at 687 (emphasis added). The obvious implication of this testimony is that §4b should be construed in much the same manner as Rule 10b-5, which has been interpreted by this Court to support a private right of action for defrauded investors.[20] It is noteworthy in this regard that none of the legislators suggested that an interpretation of §4b similar to that of Rule 10b-5 would be inappropriate.

As the foregoing analysis of the legislative history clearly indicates, members of Congress were plainly aware of the judicial implication of a private right of action under §4b of the CEA and anticipated that such private remedy would continue, a critical distinc-

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[20] In *Superintendent of Insurance of New York v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), this Court stated that "[i]t is now established that a private right of action is implied under § 10(b)". *Id.* at 13 n. 9. This Court unanimously agreed that "Section 10(b) must be read flexibly, not technically and restrictively." *Id.* at 12.

tion between this case and other recent decisions of this Court which have declined to imply a private right of action. *See California v. Sierra Club, supra*, at 1781. As noted by Judge Friendly in *Leist v. Simplot, supra*, "[i]t is just as much 'judicial legislation' for a court to withdraw a remedy which Congress expected to be continued as to improvise one that Congress never had in mind." *Id.* at 313. The judicial climate[21] at the time of the 1974 amendments certainly gave Congress no reason to suspect that a private remedy would not continue to be implied by the federal courts. *Cannon, supra*, at 718 (Justices Rehnquist and Stewart, concurring). As noted in *Cannon, supra*, at 686-87 n. 7, judicial interpretation of a federal statute may take into account the fact that "many 'members of Congress may have assumed that private suits were authorized' ". The long-standing judicial recognition of a private right of action for violations of CEA §4b is a critical distinction between the cases relied upon by petitioner and the case *sub judice*. None of the cases cited by petitioner has dealt with the interpretation of a comprehensive statutory scheme which had been enacted in the face of uniform federal court decisions recognizing the existence under identical statutory language of an implied federal right of action.[22]

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[21] *See also* the remarks of Justice Powell, dissenting, in *Cannon, supra*, concerning "... the more or less haphazard line of cases that led to our decision in *Cort v. Ash* ..." *Id.* at 731.

[22] Absent express indications to the contrary, the re-enactment of statutory language (such as §4b of the CEA) in substantially the same form or its wholesale adoption into a different statutory scheme, presumes legislative intent to perpetuate and incorporate the existing judicial interpretation of that language. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5, 14 (1939); C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION, § 49.09 (4th ed. 1973). In *Lorillard v. Pons, supra*, at 580, it was observed that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change," even where — as here — the judicial interpretations were those of lower federal courts. The *unanimity* of these federal court decisions is particularly significant. *Id.* Although the presumption is rebuttable, the 1974 amendments are patently insufficient to rebut that presumption, in light of the explicit Congressional recognition of judicially implied private rights of action and the express Congressional purpose to increase protection for commodity futures traders.

B. The Statutory Structure of the CEA is Incomplete Without the Implication of a Private Cause of Action and Rebuts any Argument that Reparations Was Intended to be the Exclusive Remedy.

As against this overwhelming evidence that Congress intended for the continuation of private rights of action under §4b of the CEA, petitioner argues that the reparation proceedings provided by §14 of the CEA, 7 U.S.C. §18, were intended by the 1974 Congress to be the *exclusive* remedy for aggrieved commodity futures traders, such as the Currans. Petitioner describes the reparation proceedings as being "[o]f particular importance to the instant case". (PB 11). Respondents fail to see why. The reparation proceedings are, by their terms, unavailable with respect to any cause of action which accrued before January 23, 1975. CEA §14(i); CFTC Reg. §12.21; *Hornblower & Weeks — Hemphill Noyes, Inc. v. Csaky, supra.* Since the Currans' discretionary accounts were liquidated in April, 1974, it is quite clear that the reparation provisions are not of any particular importance to the instant case. Despite petitioner's argument that reparations provide an acceptable "alternative remedy" for the Currans, a holding by this Court that an implied private right of action is not available to the Currans would effectively deprive them of any federal remedy.

The evidence that depriving respondents of a federal remedy would frustrate the intent of the legislature is particularly compelling. Petitioner accurately states in its brief that "[i]n construing the CEA there is no reason for a court to speculate whether Congress intended that persons aggrieved by violations of the Act be entitled to recover damages. *Plainly, Congress did so intend* ...." (PB 20) (emphasis added). In light of this acknowledged Congressional intent to fashion *some* remedy, respondents cannot accept petitioner's arguments that they be left without *any* remedy for violations of the CEA.[23] Congress enacted a federal statute which imposes upon peti-

[23] Clearly §5a(11) of the CEA, requiring each contract market to provide for voluntary arbitration of customers' claims under $15,000, is of no avail to the Currans, whose damages far exceed that minimal amount. As mentioned in the

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tioner federal duties toward persons such as the Currans, and Congress intended for civil remedies to be available to redress violations of that statute. If this Court accepts petitioner's arguments in this case, however, the Currans will be left without any remedies whatsoever for the damages suffered as a direct result of petitioner's violations of the CEA, a result which clearly could not have been foreseen or intended by Congress.

Although not necessary to the disposition of the instant case, an analysis of the CEA leads to the conclusion that reparations was not intended to be the exclusive remedy even for those plaintiffs for whom reparations may be available. Despite the panoply of fines and potential liability of a futures commission merchant, such as the petitioner in the instant case (PB 10-14), only two provisions of the CEA explicitly provide for any recovery of damages by a futures trader against his broker, neither of which was designed to afford complete relief. Section 5a(11) of the CEA requires contract markets to provide a fair and equitable arbitration procedure for the settlement of customers' claims and grievances against any member of the exchange or employee thereof, provided that: (1) the use of such procedure by a customer must be voluntary; (2) the procedure is not applicable to any claim in excess of $15,000; and (3) the procedure must not result in any compulsory payment except as agreed upon between the parties. The arbitration procedure which must be established is clearly intended as a supplemental remedy — the decision to arbitrate must be *voluntary* on the part of the customer and claims in excess of $15,000 are simply not covered.

The remaining remedy explicitly provided for defrauded investors by the CEA is reparations, CEA §14, upon which petitioner so heavily relies. (PB 11-14). Reparations, however, is available only

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text, the Currans are not entitled to invoke the benefits of a reparations proceeding. A *parens patriae* suit expressly authorized by the 1978 amendments to the CEA was not even theoretically available to the Currans when this lawsuit was commenced. Finally, a cause of action based solely upon a violation of the CEA may not be raised in state court.

to claims which arose *after* January 22, 1975, CEA §14(i), and the Currans' claims arose before that date. Even if available, the procedure envisioned by the statute is intended to be merely an expedited administrative hearing.[24] There is an express denial of an opportunity for a formal hearing where the damages claimed do not exceed $2,500[25] and the possibility for a waiver of such hearing in all other cases by the *person against whom the complaint has been made*. CEA §14(b). Thus, the individual filing a reparations complaint has no statutory right to demand a formal hearing.[26] Petitioner asserts that reparation proceedings "provide claimants with every opportunity fully and fairly to present their claims as in a court of law" (PB 12), but if the CFTC determines, *in the first instance*, that the facts alleged in the complaint do not warrant any further action, there is no administrative or judicial review explicitly provided for this denial of any relief.[27] Far from being a full and fair *exclusive* alternative to the courts, "[t]he 1974 legislation envisioned the Commission's reparations proceedings as being analogous to the operation of a small claims court." S. REP. NO. 850, 95th Cong., 2d Sess. 16 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 2087, 2104 (hereinafter "S. Rep. No. 95-850").

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[24] Reparations proceedings have become anything other than expeditious. The number of pending cases has increased from 379 at the end of fiscal year 1978 to 740 at the end of fiscal year 1979. [1979] COMMODITY FUTURES TRADING COMM'N ANN. REP. 29. When the CEA was amended in 1978, Congress was aware that the reparations backlog could be expected to continue. S. REP. NO. 95-850, *supra*, at 16.

[25] The dollar limit, set in CEA §14(b), was raised in 1978 from $2,500 to $5,000 by P.L. 95-405, Section 21(3) (1978).

[26] Although the statute does not require the consent of the complainant to the waiver of a formal hearing in cases where reparations complaints exceed $2,500 ($5,000 after 1978 amendments), CFTC Reg. §12.71(a)(1) requires a hearing "unless all the parties have waived their right to a hearing." It is significant that this important procedural safeguard is not provided by the statute. The reference in §14(b) to "such person" with a right to a hearing refers only to the person charged with misconduct.

[27] CEA §§14(a), (b), (g).

The effective dates of the 1974 amendments to the CEA lend further support to the position advocated by respondents and by the CFTC and rebuts petitioner's argument that Congress intended reparations to be the exclusive remedy for aggrieved traders. The CFTCA was made effective as of the 180th day after enactment of the law (October 23, 1974), although approval or modification of exchange by-laws to comply with the new law could take place prior to such 180th day. P.L. 93-463, §418(a) (1974). Unlike other provisions of the CFTCA, the reparation provisions did not become effective until *fifteen* months after October 23, 1974. CEA §14(i), 7 U.S.C. §18(i). The statute, if petitioner's arguments are accepted by this Court, would create three classes of potential plaintiffs: (1) those whose cause of action arose before January 23, 1975; (2) those whose cause of action arose between January 23, 1975 and January 23, 1976; and (3) those whose cause of action arose after January 23, 1976. The explicit remedies for each class of plaintiffs (excluding the opportunity for "voluntary" arbitration of claims not in excess of $15,000) would be as follows: (1) the first class of plaintiffs (to which respondents belong) have no remedy; (2) the second class of plaintiffs may initiate reparation proceedings, but not until after January 23, 1976; and (3) the third class of plaintiffs may initiate reparation proceedings immediately after their cause of action accrues. While a rational basis exists for the statutory distinction between the second and third classes of plaintiffs, particularly since the statute discriminates against the second class only to *delay* the time when a reparations complaint may be filed, without the implication of a private remedy there is no rational basis for the statutory discrimination against the first class of potential claimants who are completely foreclosed from electing reparations. Established tenets of statutory construction should lead this Court to eschew a construction of the statute yielding an unreasonable result in favor of a construction of the statute yielding a logical one.[28] Had Congress in-

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[28] "It has been called a golden rule of statutory interpretation that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which

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tended reparations to be the *exclusive* remedy for aggrieved traders, as urged by petitioner, this remedy would logically have been extended after the effective date of the CEA, to *all* traders who were defrauded by their brokers, even if their suits would have had to be delayed until after January 23, 1976. The only rational explanation for the Congressional failure to extend this particular administrative remedy to *all* futures traders damaged by a violation of the CEA was a belief that the CEA, as amended, *implicitly* provided an alternative civil forum — i.e., recourse to the federal courts, for such aggrieved traders. In fact, the comparison chart prepared by the staff of the Senate Committee on Agriculture and Forestry which listed fifteen major points of the existing law and the four bills then under consideration did not specify whether a private cause of action for simple monetary damages was provided in each bill. Although two bills, S. 2578 (§16) and S. 2837 (§505), provided separately for an express cause of action, the only description of either provision provided by the committee chart was that "civil actions may be brought by individuals for treble damages". *1974 Hearings* at 194. The only logical explanation for this omission is that an explicit statement that a private cause of action would exist under the CEA for simple monetary damages was deemed to be superfluous.

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would produce a reasonable result. It is said to be a 'well established principle of statutory interpretation that the law favors rational and sensible construction.'" C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION, §49.09 (4th ed. 1973) (citations omitted). In the case *sub judice*, only the implication of a private remedy in favor of defrauded investors against their own brokers can relieve the absurdity of the interpretation which has been urged by petitioner upon this Court. A contextual interpretation of the CEA, allowing the statute to provide the private remedy which Congress *implicitly* created, removes any inconsistency in the statutory scheme and reaches the only defensible result in the instant case. For that reason, even if for no other, the implication of a private right of action for violations of §4b of the CEA are required by simple tenets of statutory construction. *Id.* at 67, *reprinting* Bruncken, *Interpretation of the Written Law*, 25 YALE L. J. 129 (1915).

Sen. Talmadge, in explaining the reparations provisions of the legislation, stated as follows:

> The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties *is likewise not intended to interfere with the courts in any way*. It is hoped that giving the Commission this authority will somewhat lighten the burden upon the courts, but the entire appeal process and the right of final determination by the courts are expressly preserved.

120 CONG. REC. 30459 (1974) (emphasis added). As noted by Judge Friendly in *Leist v. Simplot, supra*:

> The first sentence strongly suggests that Congress did not intend to repeal private rights of action by enacting the reparations procedure, and the second sentence is not to the contrary. If the reparations procedure was intended to be exclusive, then it *certainly* would lighten the burden on the courts, even with review of reparations orders by the courts of appeals. But the Senator spoke in terms of "hope" and lightening the burden "somewhat" — as if reparations were an alternative he hoped had been made attractive enough to sway some aggrieved traders away from the courts. The second clause relating to judicial review simply noted that even for those who elected reparations there could still be court involvement.

Id. at 313.

The majority opinion of the court below properly emphasized the point that the CFTC, the government agency charged with administration of the CEA, as amended in 1974, has *never* viewed reparations as providing for an exclusive remedy:

> The CFTC has consistently interpreted the reparations section as permitting commodity customers an election of forums in which to pursue their claims. *See* 41 Fed. Reg. 3994 (1976); 41 Fed. Reg. 18472 at n.5 (1976);

> *Stucki v. American Options Corp.*, CCH Comm. Fut. L. Rep ¶20,559 at 22,283 (CFTC 1978). The CFTC will not even entertain a reparation claim if civil court litigation involving the same facts and parties has been instituted. 17 C.F.R. §12.21(a)(7) (1977). We recognize that "...the consistent construction of a statute 'by the agency charged with its enforcement is entitled to great deference by the courts.' " *United States v. Consumer Life Insurance Co.*, 430 U.S. 725, 752, 97 S.Ct. 1440, 1454, 52 L.Ed.2d 4 (1977), quoting from *NLRB v. Boeing Co.*, 412 U.S. 67, 75, 93 S.Ct. 1952, 36 L.Ed.2d 752 (1973); *see also, Chemehuevi Tribe of Indians v. Federal Power Commission*, 420 U.S. 395, 409-10, 95 S.Ct. 1066, 43 L.Ed.2d 279 (1975).

PC A-33. *See also* "Reparation Proceedings", [1975-1977] COMM. FUT. L. REP. (CCH) ¶20,129 (January 27, 1976). ("These reparation rules provide the procedures by which a claimant may pursue one of the remedies the law will permit for the recovery of claims. The other available remedies are arbitration and the filing of a lawsuit in an appropriate state or federal court.")

Even without the aid of the legislative history of the CFTCA, the reparations procedure is insufficient on its face to have been intended by Congress as an exclusive private remedy for claims in excess of $15,000. First, this remedy is available only to a limited class of plaintiffs, a point which respondents leave to be more fully developed in the companion cases. *See Leist v. Simplot, supra*, at 312-13. Second, even with respect to those persons for whom the "benefit" of reparations may be available, the remedy is apparently available only if the Commission, in its opinion, determines that the facts contained in the initial petition warrant any further investigation. CEA §14(a). Unless "there appear to be, in the opinion of the Commission, any reasonable grounds for investigating any complaint," CEA §14(b), the matter is apparently at a close, with the Commission's exercise of its discretion not subject to any sort of judicial review. (CEA §14(g), dealing with appeals, provides only for persons aggrieved by any "*order*" of the Commission, which is defined in CEA §14(e) and does not include a decision not to pro-

ceed with a complaint). This lack of judicial review is explainable only because Congress assumed that access to the federal courts would continue to be available, as it had been prior to 1974.[29] Third, the express language of CEA §14(a) states that an aggrieved individual "*may*" initiate a reparations proceeding, which certainly could be deemed to imply an option on the part of such individual to take his complaint elsewhere. For claims in excess of $15,000, any alternative forum could only be the federal district court. *Alken v. Lerner*, 485 F.Supp. 871 (D.C. N.Y. 1980). Finally, CEA §14(b) obviously contemplates that claims which do not exceed $5,000 may be handled through reparations. These procedures are informal and can be analogized to the settlement procedures provided elsewhere by the CEA, which are expressly made voluntary. CEA §§5a(11), 17(b)(10). Logically, the reparations remedy is similar to the other remedies expressly provided by the CEA. An aggrieved trader, therefore, should not be compelled to resort to the reparations procedure. BROMBERG & LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD, §461 at 82.362 (1979); *Smith v. Groover*, 468 F.Supp. 105 (N.D. Ill. 1979); *Jones v. B.C. Christopher & Co.*, 466 F.Supp. 213 (D. Kan. 1979); *R. J. Herely & Son Co. v. Stotler & Co.*, 46 F.Supp. 345 (N.D. Ill. 1979).

Having thus disposed of petitioner's most forceful argument, a few scattered arguments remain which can be quickly answered. First, petitioner argues that the proviso in §2(a)(1) of the CEA, 7 U.S.C. §2, that "[n]othing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State" (PB 30) does not indicate any Congressional intent to preserve the previously acknowledged private right of action. However, the Rodino-Clearwaters statements offered by petitioner to explain the quoted language are not limited to concern over the possible preemption of antitrust jurisdiction. (PB 31). Keith Clearwaters, Deputy Assistant Attorney General, testified before the Senate committee that the language of §201(B) of H.R. 13113, unless clarified by the above-quoted proviso, "could be interpreted to deprive the

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[29] *See* n. 19 *supra*.

Federal courts of their jurisdiction under the antitrust laws and to deprive Federal and State courts of jurisdiction to enforce contract and commercial law rights." *1974 Hearings* at 663. Depriving state courts of jurisdiction (or federal courts of diversity jurisdiction) could not have been the intended effect, since "no substantive provisions in the nature of contract or commercial law are included in the bill. Clearly, the Commission was not intended to adjudicate disputes between commodities brokers and their customers over contract terms or similar matters." *Id.* at 663-64 (statement of Mr. Clearwater). The Chairman of the committee, Sen. Talmadge, responded to Mr. Clearwaters as follows: "I doubt that this committee, and I doubt the House had in mind depriving either Federal courts or [*sic*] jurisdictions in antitrust matters, *or any other matter*, and certainly not State courts." *Id.* at 664 (emphasis added). Sen. Talmadge summarized the concerns of James Halverson as substantially the same as those of Mr. Clearwaters, *i.e.*, "to make clear that the courts can still operate." *Id.* at 668.

In addition to these statements, Senator Clark, while expressing a preference for a treble damages provision, noted that "[u]nfortunately, the House bill [H.R. 13113] not only does not authorize them, but Section 201 of that bill may prohibit all court actions. The staff of the House Agriculture Committee has said that this was done inadvertently and they hope it can be corrected in the Senate." *1974 Hearings* at 205. Professor Roy Schotland testified that, if the reparations proceedings were enacted "there should be explicit language in the statute that Federal and State courts are still open if a complainant prefers to go to trial there." *Id.* at 737, 746.

The purpose of the Senate amendment to §201, according to the Joint Explanatory Statement of the Conference Committee on H.R. 13113, was to make clear that federal and state courts would *retain their respective jurisdictions*. 120 CONG. REC. 33042 (1974). This explanation and the statements quoted above, coupled with Congress' knowledge of the existence of an implied right of action for violations of the CEA, lead to the inescapable conclusion that Congress *intended* for this private right of action to continue.

C. The 1978 Amendments to the CEA Provide Further Evidence of Congressional Intent to Create a Private Right of Action Under the CEA.

Petitioner also argues that the 1978 amendments to the CEA, by explicitly providing for *parens patriae* actions by state attorneys general on behalf of residents of their respective states, CEA §6d, negates any intention by Congress *implicitly* to provide for a right of action by private individuals. (PB 33). The legislative history of the 1978 amendments simply does not support petitioner's argument.

Much discussion of the need for §6d, authorizing *parens patriae* suits, can be gleaned from the legislative history of the 1978 amendments. The inescapable conclusion which is reached from an analysis of that legislative history is that *parens patriae* suits could have been instituted under prior law, but that states had been unwilling to invoke that doctrine absent explicit (rater than implicit) legislative authority. The CFTC itself repeatedly brought this problem to the attention of the legislators. *Hearings Before the Subcommittee on Conservation and Credit of the Committee on Agriculture, House of Representatives on H.R. 10285*, 95th Cong., 2d Sess. XI (1978) (summary of CFTC position) (hereinafter "*1978 House Hearings*"); *id.* at 36 (statement by William T. Bagley, CFTC Chairman, that "we have . . . urged the States to implement the doctrine of *parens patriae*"); *id.* at 63 (statement by John V. Rainbolt, II, CFTC Vice Chairman, that "States have been reluctant to use the *parens patriae* theory. In any case, it has *incorrectly* been stated by state securities commissioners that States are totally preempted. Accordingly, the Commission seeks to *clarify* these responsibilities by inserting within the Act express authorization for States to bring suit as *parens patriae* . . ."); *id.* at 81 (remarks of Mr. Rainbolt); *id.* at 91 (remarks of Mr. Bagley). The 1978 amendments were also needed to forestall certain restrictions which had been imposed by the common law *parens patriae* doctrine, such as the requirement that the State could intervene only to protect its quasi-sovereign interests. S. REP. NO. 95-850, *supra*, at 25.

Senator Leahy, in discussing the 1978 amendments to the CEA, explainted the *parens patriae* provision by expressly referring to the existence of private rights of action:

> The exemption from State suits provided to contract markets is justified due to the deterrent effect on contract markets caused by Commission regulation, institution of Commission enforcement proceedings, and the implied private rights of action that may be brought against those contract markets that fail to discharge their duties under the Commodity Exchange Act. In those actions brought by a State under this bill, a customer who makes an informed, voluntary election to have his State sue on his behalf to recover monetary damages for a particular violation would thereby extinguish that person's other alternatives for redress: arbitrations, reparations, *or judicially implied private rights of civil action under the Act*.

124 CONG. REC. 16527 (Sept. 28, 1978) (emphasis added).

Other aspects of the 1978 amendments further support respondents' view that an implied private right of action was intended to continue as part of the total legislative scheme. The reparations rules promulgated by the CFTC were described as having created "in effect, a 'small claims court' for persons who had suffered losses due to violations of the CFTC Act and regulations," *1978 House Hearings* at 17 (statement by CFTC Chairman Bagley), which is entirely inconsistent with petitioner's claim that reparations was intended by Congress to be the *exclusive* remedy for large damage claims. Further, Senator Huddleston, sponsor of the 1978 amendments, explained the reason for a modification of the reparations procedure in the following fashion:

> Compounding the undue stress placed on the reparation program, certain Federal district courts have taken the unfortunate position that Congress intended reparations to be the exclusive forum for adjudicating commodity customer claims. [citations omitted.] In order to alleviate the burden on the Commission's reparation program, the committee adopted an amendment that provides —

> for reparation complaint where the amount claimed as damages does not exceed $5,000 — that a hearing be held only on the novel or basic issues that are determinative of the case. Thus, an aggrieved commodity customer will be able to obtain more expenditious treatment of his claim should the customer elect to pursue a claim in reparations rather than to proceed to arbitration or pursue in court the private right of action which has been judicially implied for violations of certain provisions of the Commodity Exchange Act, or which in the future courts may recognize for other provisions of the act.

124 CONG. REC. 10537 (1978); *see also Alken v. Lerner, supra*.

Thus, contrary to petitioner's agruments before this Court, the 1978 amendments to the CEA and the corresponding legislative history are both supportive of the plainly expressed Congressional intent to permit the continuation of private rights of action on behalf of commodity futures traders who have been damaged by violations of the CEA.

Congressional intent to sanction the continuing implication of a private right of action for violations of the CEA has not been negated by any of the arguments offered by petitioner. On the contrary, Congress enacted the CFTCA with a knowledge that private rights of action had been judicially implied under the CEA and expressly preserved the jurisdiction of federal and state courts. The legislative history evinces a clear Congressional intent that private rights of action be continued and the 1974 and 1978 amendments can only be viewed as supplementing, rather than excluding, the previously existing private right of action. Any other interpretation of the CEA would ignore Congressional intent, thereby eroding, if not destroying, the principles set forth in this Court's decision in *Touche Ross, TAMA* and *Cannon, supra*.

III.

IMPLICATION OF A PRIVATE RIGHT OF ACTION IS ENTIRELY CONSISTENT WITH THE UNDERLYING PURPOSES OF THE LEGISLATIVE SCHEME

It is virtually self-evident that the underlying purpose of the CFTCA, *the protection of investors*, 120 CONG. REC. 9402, Point F. (1974) (remarks of Rep. Smith); 120 CONG. REC. 10737 (1974) (remarks of Rep. Poage that the legislation "sets up new customer protection features"); INTERIM REPORT, *supra; 1973 Hearings* at 11 (remarks of Rep. Smith), can best be served by the implication of a private right of action for violations of the CEA. *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). The CFTC, the regulatory agency in charge of the administration of the CEA, has itself urged that the continued availability of a private right of action is necessary to ensure enforcement of the CEA. *Leist v. Simplot, supra*, at 321, citing the *amicus brief* filed in that case by the CFTC. The position of the Currans in the instant case is even further justification for the implication of a private remedy, since otherwise there will be no remedy available to compensate them for petitioner's fraud. In a case such as this, it can hardly be argued that the implication of a private remedy is not necessary to effectuate Congressional intent. As further evidence of the appropriateness of an implied remedy, the 1978 amendments to the CEA were designed partially to alleviate the backlog of reparations proceedings, 124 CONG. REC. 10537 (1978) (remarks of Sen. Leahy), a backlog which is becoming increasingly more severe.[30] Despite this, the argument advanced by petitioner in the instant case would lead to a much higher volume of reparations cases, since it would foreclose any alternative federal remedy for aggrieved customers.

Nor can it be argued that the position advanced by petitioner would reduce the congestion in the judicial system. Even if it is held that no federal private right of action exists for violations of §4b of

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[30] *See* n. 24, *supra*.

the CEA, the federal courts would still be required to adjudicate commodity issues raised by state law claims on the basis of diversity jurisdiction. 28 U.S.C. §1332. Under such circumstances, the federal courts would have to apply applicable state law in order to resolve common law commodity claims, *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), which hardly comports with the Congressional intent that commodity law should develop exclusively in the federal courts. The federal courts were made the exclusive forum for all claims based upon violations of the CEA so that a coherent body of case law could evolve. SEN. REP. NO. 95-850, *supra*, at 25. In the absence of an implied federal cause of action, piecemeal litigation is likely to develop. Complaints that provisions of the CEA were violated could be theoretically handled through reparations, CEA §14(a), while state law claims (such as allegations that a broker breached a contract with his customer) would have to be handled through various state courts. Nor is it certain that an adverse decision in a reparations proceeding would necessarily preclude a customer from subsequently seeking relief in state courts on state law claims.[31] Only in federal courts, through the exercise of pendent jurisdiction, can all federal and state law claims related to a single transaction be raised in a single forum.

Against the obvious desirability of private lawsuits to effectuate Congressional intent and the consistent interpretations of the CFTC that reparations was designed merely to supplement private remedies, 41 Fed. Reg. 3994 (1976); 41 Fed. Reg. 18472 n. 5 (1976); 17 C.F.R. §12.21(a)(7) (1977); *Stucki v. American Options Corp.*, [1977-1980] COMM. FUT. L. REP. (CCH) ¶20,559 at 22,283 (CFTC 1978), petitioner argues that the allowance of a private remedy would somehow upset a delicate "balance" in the regulatory scheme. Respondents fail to accept petitioner's basic premise in this

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[31] Common law claims and agency claims which are cognizable by state law and which arise during the course of the broker-customer relationship are not specifically authorized to be brought before the CFTC in a reparations proceeding. It is arguable, therefore, that an adverse decision in a reparations proceeding may not be *res judicata* with regard to subsequent state court litigation.

regard, which is that litigation in the federal courts would be so much more onerous and burdensome to defendants than would a complete reparations proceeding, followed by an appeal to the federal courts. Petitioner cites to *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-43 (1975) (PB 37) as evidence that federal litigation may be unduly onerous and disruptive, but the situation described in *Blue Chips* is not at all analogous to the case *sub judice*. The litigative burden enunciated in *Blue Chips* dealt with a defendant's potential liability if the purchaser-seller requirement of Rule 10b-5 was abrogated. In such a case, the class of potential plaintiffs would be unlimited. By contrast, a violation of §4b of the CEA can only create a cause of action against a broker *in favor of his customer*. The explicit language of §4b causes its provisions to be violated only if the broker's misconduct is directed towards *his own customer*. Thus, a requirement of privity can fairly be read into that statute, which is a far cry from the situation described in *Blue Chips*. Since a customer can, in any event, file a lawsuit against his broker alleging violations of contract and commercial claims under state law (Counts I, II, III, VII, VIII, and IX of the Currans' complaint in the instant case — JA 15-20), and since diversity of citizenship may result in a trial of these issues in federal court, 28 U.S.C. §1332, it is difficult to understand how the implication of a private cause of action under §4b of the CEA could have any deleterious effect upon the regulation of commodity futures trading.

IV.

THE REGULATION OF TRADING ON THE COMMODITY FUTURES MARKET IS NOT TRADITIONALLY RELEGATED TO STATE LAW

The federal government has been closely involved in the regulation of commodity futures trading since 1922, and §2(a)(1) of the CEA pre-empts the application of state law. *International Trading, Ltd. v. Bell*, 262 Ark. 244, 566 S.W. 2d 420 (1977); BROMBERG & LOWENFELS, *supra*, at §4.6. Even petitioner acknowledges that the "CEA manifestly makes regulation of commodity futures trading a

federal concern." (PB 39). No wonder, then, that petitioner refuses to address directly the fourth consideration set forth in *Cort*. Petitioner's arguments in this regard have been adequately addressed in Part II-B, *supra*. Suffice it to say that the fourth *Cort* factor makes it perfectly clear that it would not be inappropriate to imply a federal cause of action for violations of §4b of the CEA.

CONCLUSION

For the foregoing reasons, Respondents J.J. Curran and Jacquelyn L. Curran respectfully request that the Court affirm the Judgment of the Court of Appeals with respect to the continued existence of a private right of action under CEA Section 4b.

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No. 80-203

In the Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
PETITIONER,

VS.

J. J. CURRAN AND JACQUELYN L. CURRAN,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER, MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

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I.

A HOLDING BY THIS COURT THAT NO PRIVATE RIGHT OF ACTION EXISTS UNDER SECTION 4b OF THE CEA WILL NOT LEAVE RESPONDENTS WITHOUT A REMEDY.

The Currans argue that the CEA reparations procedures were unavailable to them and that consequently they had no remedy in the absence of an implied right of action under the CEA (RB 1).[1] They base their argument on section 14(i) of the CEA[2], the thrust of which is that reparations are available only for "claims which arise" after January 23, 1975. The Currans assert that their cause of action accrued prior to May, 1974 (RB 1).

Respondents' argument must be rejected because they alleged completely different facts before the trial court and should not be allowed to submit a conveniently altered set of facts for the very first time before this Court. *Cf., Imperial Casualty & Indemnity Co. v. Relder*, 308 F.2d 761, 763 n.1 (8th Cir. 1962). Specifically, on August 20, 1976, the Currans filed a brief entitled "Plaintiff's Reply Memorandum In Opposition To Motion To Dismiss And Stay Proceedings". At pages 19-20 the Currans told the District Court that because they discovered the alleged fraud after April 5, 1975, their fraud claim by law accrued less than one year prior to the filing of the complaint on April 5, 1976 — *i.e., after* April 5, 1975. Because section 14(i) provides that reparations are

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[1] "RB__" refers to the Brief of Respondents; "PB__" to the Brief of Petitioner.

[2] CEA section 14(i), 7 U.S.C. §18(i) states: "The provisions of this section shall not become effective until 15 months after October 23, 1974: *Provided*, That claims which arise within one year immediately prior to the effective date of this section may be heard by the Commission after such fifteen months period."

available for claims arising after January 23, 1975, Respondents' contention must obviously fail.

Even assuming that the fraud claim arose prior to January 23, 1975, the Currans' statements in the District Court to the contrary notwithstanding, their assertion that they have no remedy in the absence of an implied private right of action under the CEA is incorrect. In such circumstances, and prior to the existence of the pervasive regulatory scheme embodied in the post-1974 CEA, Respondents could sue for fraud in state court under the common law of Michigan.

The Commodity Futures Trading Commission Act of 1974, P.L. 93-463, 88 Stat 1389 ("1974 Amendments"), which completely overhauled the CEA, was enacted on October 23, 1974. One major consequence of the legislation was the addition to section 2(a)(1) of the following preempting language: "...[The Commodity Futures Trading] Commission shall have exclusive jurisdiction with respect to accounts, agreements...and transactions involving contracts of sale of a commodity for future delivery..." This langauge operated to oust state courts of jurisdiction over fraud involving transactions in futures, and other conduct violative of the CEA.[3] However, the effective date of this language was April 23, 1975 — 180 days after enactment. *See* §418(a) of the 1974 Amendments at [1974] U.S. Code Cong. & Ad. News 1589, 1622. Therefore, assuming Respondents are correct and their

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[3] The CFTC, as *amicus curiae*, disputes the preemptive effect of the 1974 Amendments (CFTC Brief at 11, n.14). The issue of whether the 1974 Amendments preempt a right to pursue, in *state* court, a common law fraud claim involving futures contracts is not presented by this case and need not be addressed by the Court. To the extent the Court believes the issue is relevant, Merrill Lynch submits that the "exclusive jurisdiction" provision of CEA section 2(a)(1), 7 U.S.C. §2, together with the pervasive regulatory scheme embodied in the 1974 Amendments, plainly indicates Congress' preemptive intent.

fraud claim arose prior to January 23, 1975, this was at least three months before the preemptive 1974 Amendments deprived state courts of their jurisdiction over fraud involving futures contracts. Consequently, the Currans would not be without a remedy even if this Court were to accept their revised version of the facts. They could sue Merrill Lynch for fraud in state court under the common law.

The Currans' plea that absent an inferred federal judicial remedy they are without a forum in which to seek redress is not, therefore, persuasive. If, as the Currans claimed in the District Court, their claim accrued after April 1975, the Currans can pursue reparations under CEA section 14. If, as they now argue, their claim accrued in May 1974, they may seek redress in the state courts. Finally, it should be noted that Merrill Lynch has sought to arbitrate Respondents' claim pursuant to the agreement Respondents signed when they opened their accounts, thereby offering yet another available forum.

Regardless, however, of whether their claim accrued prior or subsequent to the effective date of the 1974 Amendments, the Currans may not bring suit against Merrill Lynch in federal court under the CEA. A few erroneous lower court decisions to the contrary notwithstanding, there has never been a private cause of action under section 4b of the CEA, neither before nor after the 1974 Amendments. Since enactment of the CEA in 1936, there has never been language in the statute providing for such right of action, and there has never been anything in the legislative history indicating any Congressional intent that such right of action exists.[4]

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[4] For a full discussion of whether an implied private right of action in federal court could properly have been recognized under the CEA prior to the 1974 Amendments, see Brief of Petitioner Clayton Brokerage Co. filed in *Clayton Brokerage Co. of St. Louis, Inc. v. Leist*, No. 80-895.

II.

PRE-1974 CASE LAW DOES NOT JUSTIFY AN INVERSION OF THIS COURT'S INQUIRY UNDER *CORT* v. *ASH*: RESPONDENTS' INVITATION TO FOCUS ON WHETHER CONGRESS MANIFESTED AN INTENT TO DENY A "PRE-EXISTING REMEDY" CONCEDES THAT SUCH A REMEDY WAS NEVER AFFIRMATIVELY CREATED.

Cort v. Ash, 422 U.S. 66, (1975), *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) and *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, ____ U.S. ____, 49 U.S.L.W. 4783 (June 25, 1981) require an affirmative showing that Congress intended to legislate a private right of action under CEA section 4b.[5] As demonstrated in the Brief of Petitioner, and in the Brief of Petitioner Clay-

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[5] *Amicus* CFTC purports to distinguish *National Sea Clammers*, claiming that the case puts the burden on Petitioner to show an affirmative Congressional intent to extinguish an existing remedy (Brief of *amicus* CFTC at 8, n.9). What *National Sea Clammers* actually holds, of course, is that when there is a preexisting private right of action *expressly created by statute* (in that case 42 U.S.C. §1983), the party alleging that such *express* right of action has been implicitly foreclosed by subsequent regulatory legislation has the burden of establishing that implicit intent. Here, establishing federal jurisdiction remains the Currans' burden, and since the CEA does not expressly confer the jurisdiction asserted, it is the Currans' burden to establish an affirmative Congressional intent to create the alleged right of action.

The Court's decision in *National Sea Clammers* weighs heavily against the Currans' position. In that case, enactment of a pervasive regulatory scheme was held sufficient to demonstrate Congressional intent implicitly to abrogate an *express* statutory right of action. In the case at bar, a similarly pervasive regulatory statute manifestly precludes inference of an additional remedy that Congress never affirmatively created.

ton Brokerage Co., No. 80-895 (with respect to the 1936 enactment of the CEA), since the CEA's inception in 1936 there has been nothing in its legislative history nor in the language of the statute itself indicating the existence of such actions. Respondents, and the Commodity Futures Trading Commission ("CFTC") as *amicus curiae*, have attempted to avoid the requirements of *Cort, Touche Ross, Transamerica* and *National Sea Clammers* by claiming that a private cause of action for fraud existed prior to the CEA's restructuring in 1974 due to "the unanimous interpretation of the federal courts that § 4b of the CEA afforded a private remedy for commodity futures traders against their own brokers" (RB 17-18), and by arguing that the proper inquiry therefore is whether Congress in 1974 intended to repeal the alleged preexisting private action.

The Currans' argument rests upon the false premise that the courts may legislate causes of action. Furthermore, in the process of seeking to invert the focus of *Cort, Touche Ross, Transamerica* and *National Sea Clammers*, Respondent and the CFTC have found it necessary greatly to exaggerate the scope of pre-1974 federal court decisions concerning private suits under CEA section 4b. As will be shown below, very few district courts, and not a single appellate court, found an implied right of action under section 4b prior to the 1974 amendments.

Merrill Lynch urges that the Currans' inversion of *Cort* and its progeny not distract this Court from the most important fact before it: the absence from the statute, both before and after the 1974 Amendments, of the 20 or so words necessary to create — simply, clearly and unambiguously — a private right to sue in federal court for damages arising from violation of section 4b. It is this omission which places on *Respondents* the burden of establishing an *affirmative* Congressional intent to *create* a cause of action. This omission has even greater

significance following the 1974 Amendments, when the omission persisted despite comprehensive Congressional review and expansion of the statute, including enactment of an elaborate remedial scheme providing for quasi-judicial reparations proceedings.

A brief discussion of the pre-1974 decisions cited by the Currans will show that they have not accurately characterized the state of the law prior to 1974. The assertion that it was the "unanimous interpretation of the federal courts" that private suits were permissible under CEA section 4b is greatly exaggerated.

A. Certain Decisions Cited By Respondents Did Not Deal with CEA Section 4b.

United Egg Producers v. Bauer International Corp., 311 F. Supp. 1375 (S.D.N.Y. 1970), held that the plaintiff agricultural cooperative could obtain a preliminary injunction against the defendant, an egg importer, for willfully issuing false and misleading statements in violation of CEA section 6(c). There was no customer-broker relationship before the court, and CEA section 4b was not in issue.

Deaktor v. L.D. Schreiber & Co., 479 F.2d 529 (7th Cir. 1973), held that claims by traders against the Chicago Mercantile Exchange and members thereof for alleged violations of CEA sections 5a(8) and 6(c) were not within the primary jurisdiction of the Commodity Exchange Commission. The court went on to hold that a private lawsuit could be predicated on these sections, but CEA section 4b was not in issue. Furthermore, *Deaktor* was reversed by this Court in *Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973), which held that the Commodity Exchange Commission did have primary jurisdiction. This Court did not address the private right of action issue.

Seligson v. New York Produce Exchange, 378 F. Supp. 1076 (S.D.N.Y. 1974), *affirmed on other grounds*, 550 F.2d 762 (2d Cir. 1977), *cert. den.*, 434 U.S. 823 (1977) cited the Court of Appeals decision in *Deaktor* and held that a cause of action is available to exchange "member-brokers" against an exchange, apparently referring to CEA section 5(d). Section 4b was not in issue.

B. Members of Congress Debating the 1974 Amendments Could Not Have Been Aware of Certain of the Decisions Cited by Respondents.

Seligson, *supra*, was decided on May 17, 1974, only five months before final enactment of the 1974 Amendments. Consequently, besides failing to address the CEA's antifraud provisions, *Seligson* was very possibly unknown to the legislators debating the 1974 Amendments.

Hirk v. Agri-Research Council, Inc. [1974-75] Fed. Sec. L. Rep. (CCH) ¶94,738 (N.D. Ill. 1974) held that private damage actions were permissible under section 4b, but was decided June 24, 1974, a mere 120 days prior to the enactment of the 1974 Amendments. It is very possible that none of the legislators debating the amendments were aware of this decision.

The appellate decision in *Hirk*, 561 F.2d 96 (7th Cir. 1977) devoted one sentence of a footnote to this issue, was decided more than two years after the overhaul of the CEA and obviously had no impact on the legislators' decision. The same is true of *Bartley v. P. G. Commodities Associates, Inc.* [1975-1977] Comm. Fut. L. Rep. (CCH) ¶20,123 (S.D.N.Y. 1975).

C. Certain Decisions Cited By Respondents Are Inapposite.

In *Hecht v. Harris Upham & Co.*, 283 F. Supp. 417, 437 (N.D. Cal. 1968), the District Court held that on the facts before it, which involved both securities and commodities, the "churning" of the plaintiff's commodity account could "be regarded as a mere device for churning the security account . . ." Accordingly, the court concluded that the defendant was liable for churning the plaintiff's accounts "in violation of §10b of the Securities Act . . ." 283 F. Supp. at 439-40. No mention was made of a CEA violation, and the issue of private suits under the CEA was not addressed. The Court of Appeals affirmed, modified the damage award and said nothing about private causes of action under the CEA. 430 F.2d 1202 (9th Cir. 1970).

The District Court in *Gould v. Barnes Brokerage*, 345 F. Supp. 294 (N.D. Tex. 1972), with no reasoning or case support whatsoever, stated that it had jurisdiction over claims based on the CEA by virtue of 28 U.S.C. §1337. The court did not address the substantive issue of whether a private cause of action existed for violation of the CEA.

In *Johnson v. Arthur Espey, Shearson, Hammill & Co.*, 341 F. Supp. 764 (S.D.N.Y. 1972), the plaintiff was a stockholder suing derivatively on behalf of a corporation for alleged churning of a corporate commodity account. Although the court opined that the complaint stated a claim under CEA section 4b, it dismissed the plaintiff's claims without prejudice for failure to make demand for redress upon the corporate directors prior to filing suit.

In *Booth v. Peavey Co. Commodity Services*, 430 F.2d 132 (8th Cir. 1970), the Court of Appeals affirmed a directed verdict for the defendant that there was no churning of the plaintiff's commodity account. The court stated its belief that a

private action under the CEA for churning is permitted, but only after the court acknowledged that "the point has not been argued by the parties. . ." 430 F.2d at 133. This observation was not at all necessary to the decision because the court affirmed the trial court's decision that there was, on the basis of the facts before it, no churning of plaintiff's account. As unsolicited dictum, this facet of the opinion carries little weight.

Respondents therefore are left with only four district court cases to support their contention that "it was the unanimous interpretation of the federal courts" that section 4b provided a private remedy (RB 17).

D. Respondents' Four Pre-Amendment District Court Decisions Did Not Create a Private Cause of Action Under CEA Section 4b.

The four district court cases upon which the Currans rely to establish their claimed right of action are: *Goodman v. Hentz*, 265 F. Supp. 440 (N.D. Ill. 1967); *Anderson v. Francis I. du Pont & Co.*, 291 F. Supp. 705 (D. Minn. 1968); *McCurnin v. Kohlmeyer & Co.*, 340 F. Supp. 1338 (E.D. La. 1972); *Arnold v. Bache & Co., Inc.*, 377 F. Supp. 61 (M.D. Pa. 1973). *Goodman* is the most important of these decisions. It was the first to so hold, and is the decision which all the other cases cite, sometimes verbatim and at length. It therefore merits special attention.

Goodman was decided 31 years after enactment of section 4b, and characterized the issue under discussion as a "novel question". 265 F. Supp. at 446. The court based its decision on the law of negligence as set forth at Restatement, Torts, §286, and stated that:

> Violation of a legislative enactment by doing a prohibited act makes the actor liable for an invasion of the interest of another if: (1) the intent of the enactment is exclusively

> or in part to protect the interest of the other as an individual; and (2) the interest invaded is one which the enactment is intended to protect. 265 F. Supp. at 447.

This is the tort per se reasoning expressly rejected by this Court in *Touche Ross*, 422 U.S. at 568.

Respondents are asking this Court to do four things: Ignore the rules of statutory construction set forth in *Cort*, *Touche Ross*, *Transamerica* and *National Sea Clammers*; ignore Congress' purposeful omission, since the CEA's inception, of language bestowing a private right of action; ignore the glaring omission of a private cause of action from the massive remedial scheme enacted in October, 1974; and unconstitutionally legislate a private cause of action for fraud because four United States district courts did so by means of an expansive reading of the law of negligence. Only Congress — and not the district courts of Illinois, Minnesota, Louisiana or Pennsylvania — may enact legislation.

Goodman was decided only seven years prior to the comprehensive overhaul of the CEA in 1974. By way of contrast, in recognizing an implied cause of action under section 10b of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), in *Superintendent of Insurance v. Bankers Life and Casualty Company*, 404 U.S. 6 (1971), this Court "...explicitly acquiesced in the 25 year-old acceptance by the lower federal courts of a Rule 10b-5 cause of action." *Cannon v. University of Chicago*, 441 U.S. 677, 690-93 n.13 (1979). Indeed, this Court in *Bankers Life* followed literally *hundreds*[6] of lower court decisions holding in favor of implied actions under section 10b. The paucity of judicial treatment of the CEA, by way of comparison, is quite obvious. In these circumstances, it would be an infringement upon a purely legislative prerogative for the courts to engraft a private cause of action onto the CEA.

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[6] *See, Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731 (1975).

Reliance by Respondents and *amici* upon the few pre-1974 district court cases, in conjunction with the proviso to CEA section 2(a)(1), as an expression of legislative intent to preserve a "preexisting" private right of action is misplaced. In addition to the fact that the proviso was expressly intended to serve other purposes (i.e., preservation of court jurisdiction over some contract and antitrust matters [PB 30-32]), its language does not support Respondents' theory.

Specifically, the proviso states that "[n]othing in this section shall supersede or limit the jurisdiction *conferred* on courts of the United States or any State" (emphasis added). Under articles I and III of the Constitution, only Congress can *confer* jurisdiction on the federal courts. The courts cannot confer jurisdiction upon themselves. No provision of the CEA, either prior to or after the 1974 Amendments, confers jurisdiction upon the federal courts to entertain private damage claims based upon fraud. The federal jurisdiction that the proviso preserves is that which has previously been *conferred* upon the courts in accordance with the Constitution, e.g. as in some contract (where diversity exists) and antitrust cases. It is a solecism and a boot-strap argument to claim that the proviso preserves jurisdiction that some courts have unconstitutionally conferred upon themselves through reliance upon an impermissible tort per se analysis. *See, e.g., Goodman v. Hentz, supra.*

The invitation of the Currans and *amici* to invert the analysis of *Cort* and *Transamerica*, and search for a Congressional intent to *deny* a right of action is an invitation to the courts and Congress to reverse their constitutional roles. Under Respondents' theory, the federal courts are free to define the scope of their own jurisdiction, and such jurisdiction is per se permissible unless and until Congress affirmatively acts to take it away. This might or might not be a workable theory of government, but it is not the one provided for in articles I and III of the Constitution.

To attach any importance, therefore, to the four pre-1974 decisions is to misinterpret the role of Congress in our constitutional system. A private cause of action under the CEA may be created only by a positive legislative act, not by silent acquiescence to judicial opinions. Congress has not at any time during the 45 year history of the CEA affirmatively acted to create either an express or an implicit private right of action in federal court based upon violation of the antifraud provisions of the statute.

III.

THIS COURT MAY NOT LEGISLATE A PRIVATE CAUSE OF ACTION UNDER SECTION 4b MERELY TO ENABLE COURTS TO ADJUDICATE BREACH OF CONTRACT AND FRAUD CLAIMS IN ONE PROCEEDING.

The CFTC and Samuel Friedman, in briefs filed by each as *amicus curiae*, have advanced the curious argument that this Court should recognize a private cause of action under section 4b to avoid what they perceive as an illogical fragmentation of federal court litigation. They suggest scenarios in which, for example, a futures commission merchant sues a customer in court for an account deficit, provoking a counterclaim by the customer for fraud. They conclude that if this Court holds that there is no private cause of action for fraud, the customer would have to bring his fraud claim in a reparations complaint before the CFTC, while the broker's claim would remain in court.

The procedural difficulties that *amici* claim result from this situation are more imagined than real. *Amici* ignore, for example, CFTC Reg. §12.23(b)(2), 17 C.F.R. §12.23(b)(2), which permits a broker to claim the account deficit by way of

counterclaim in reparation proceedings.[7] Sharing *amici's* interest in adjudicating all issues in a single proceeding, the broker in *amici's* scenario would, Merrill Lynch submits, typically stay or dismiss its court claim and join issues, by counterclaim, in the customer's reparation hearing. Even if *amici* are correct in alleging that some procedural inconvenience might occur, the situation, if perceived as a problem, is one that admits of legislative, not judicial, solution.

If the CEA offers the potential for parallel adjudication of broker breach of contract claims and customer fraud claims in separate forums, this result is entirely consistent with the Congressional policy manifest in the CEA. A customer who fails to pay his broker contractually agreed upon sums has not violated the CEA. He has of course breached his contract, but no provision of the CEA prohibits this particular conduct. The CEA concerns itself primarily with behavior perceived as a threat to the specialized workings of the futures markets: Willful misrepresentation, price manipulation, "cornering" of markets and excessive speculation. It does not concern itself with behavior actionable under ordinary commercial law principles, such as a failure to deliver commodities contracted for, or the failure by a customer to pay sums owing his broker.

Given the specialized concerns of the CEA, and its lack of concern with basic commercial law principles, the adjudication of a breach of contract claim in court in conjunction with specialized CFTC adjudication of a fraud claim arising from the same transaction should offend no one's notion of sound

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[7] 17 C.F.R. §12.23(b)(2) provides in its entirety: *Counterclaims*. An answer may set forth as a counterclaim facts alleging a violation and a request for a reparation award that would be a proper subject for a complaint under §12.21 or any claim which at the time the complaint is served the registrant has against the complainant if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint.

public policy. At any rate, it is *Congress'* notion of sound public policy that must prevail, and Congress, in enacting CEA section 14, perceived the CFTC's expertise as necessary to effective adjudication of complaints alleging violations of the CEA by registered persons. There is no evidence of a similar Congressional perception with respect to breach of contract complaints.

Separate administrative adjudication of section 4b fraud violations does not bring about any inefficient or inequitable fragmentation of federal court litigation. Rather, it logically results from Congress' desire to bring before one government agency, possessing ample adjudicatory and discovery powers (*see* PB 12-13, n. 26) all allegations of CEA violations committed by registered persons. *Amici's* ideas of efficient court procedures should not be allowed to frustrate Congress' purpose nor modify Congress' enactment. The exclusivity of an administrative forum for CEA litigation resulted from a deliberate, exhaustively debated legislative decision which should not be subverted by means of judicial creation of a private cause of action for fraud.

CONCLUSION

For the foregoing reasons, as well as for those raised in Petitioner's Brief, the decision of the Court of Appeals with respect to a private right of action for fraud under the CEA should be reversed.

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No. 80-203

In the Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
PETITIONER

v.

J.J. CURRAN AND JACQUELYN L. CURRAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Congress in 1974, when it comprehensively reformed the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, extinguished the private right of action then available to customers defrauded by their commodity professionals in violation of Section 4b of the Act, 7 U.S.C. (1970 ed.) 6b.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-203

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., PETITIONER

v.

J.J. CURRAN AND JACQUELYN L. CURRAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION AS AMICUS CURIAE

INTEREST OF THE COMMODITY FUTURES TRADING COMMISSION

The Commodity Futures Trading Commission is an independent federal agency created by Congress in 1974 to administer the Commodity Exchange Act, 7 U.S.C. (& Supp. III) 1 *et seq.* The Act establishes a pervasive and exclusive scheme for regulating the trading of commodity futures contracts in the United States. See 7 U.S.C. (Supp. III) 2.

The question presented in this case is whether a private right of action is available to commodity customers who have been defrauded in violation of Section 4b (7 U.S.C. 6b), the principal antifraud provision of the Act. Since its inception, the Commission has construed the Act as continuing to afford this remedy, which was well-recognized by the courts when Congress amended the Act in 1974. See 40 Fed. Reg. 55667 n.10 (1975). In the Commission's view,

private actions to redress violations of Section 4b are an important adjunct to the Commission's own enforcement efforts and thereby provide an additional deterrent to fraudulent practices. Moreover, the availability of private rights of action as an alternative to the administrative reparations procedure created in 1974 (see 7 U.S.C. 18) enables the Commission to fulfill more effectively Congress' goal that the reparations procedure should provide an expeditious and simple remedy "analogous to the operation of a small claims court." S. Rep. No. 95-850, 95th Cong., 2d Sess. 11, 16 (1978).

The Commission's interest here thus rests on its view that private litigation under Section 4b remains an essential part of the overall administrative and enforcement scheme of the Act.[1]

STATEMENT

In April 1973, respondents J.J. Curran and Jacquelyn L. Curran opened accounts with petitioner Merrill Lynch, Pierce, Fenner & Smith, Inc., for trading commodity futures contracts (J.A. 10).[2]

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[1] In *New York Mercantile Exchange* v. *Leist*, cert. granted, Nos. 80-757, 80-895 & 80-936 (Feb. 23, 1981), the Commission has presented its view that the 1974 Congress did not extinguish the private right of action that previously had been held to exist under the Act for traders injured by the manipulation of the price of a futures contract. To some extent, the arguments that we advanced in our brief amicus curiae in those cases are also relevant here, and those arguments will be incorporated by reference, where appropriate, to avoid unnecessary repetition. That brief, copies of which have been served on the parties in this case, will be referred to as "CFTC Br."

[2] Merrill Lynch is a futures commission merchant, which solicits and accepts customer orders for the purchase and sale of futures contracts, and is registered with the Commission. See Sections 2(a)(1) and 4d(1) of the Act, 7 U.S.C. (Supp. III) 2 and 6d(1).

Additional accounts were opened in August 1973 (*ibid.*) By April 1974, when Merrill Lynch finally acquiesced in respondents' demand that their accounts be closed, substantial losses had been sustained (*id.* at 14-15). Thereafter, in April 1976, respondents commenced this action in the United States District Court for the Eastern District of Michigan, claiming that they had been harmed by Merrill Lynch's fraudulent practices, which violated Section 4b of the Commodity Exchange Act, 7 U.S.C. 6b (J.A. 19; Pet. App. A-43).[3] Respondents alleged that they lost $175,000 because of these practices and that Merrill Lynch wrongfully gained from them some $45,000 in commissions (J.A. 16). With respect to respondents' Section 4b claim, the district court ordered that the proceedings be stayed pending arbitration pursuant to the provisions of a form agreement that respondents had signed (Pet. App. A-50).

The court of appeals held that the district court erred in granting this stay and therefore proceeded to determine whether a private right of action exists under Section 4b (Pet. App. A-23 to A-24). By divided vote, the court of appeals held (*id.* at A-30 to A-34) that respondents were entitled to maintain a private right of action. The court applied the four-part test for ascertaining congressional intent that this Court established in *Cort* v. *Ash*, 422 U.S. 66

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[3] Respondents alleged that Merrill Lynch's practices also violated various provisions of the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, and state statutory and common law (see J.A. 19; Pet. App. A-2). The district court granted partial summary judgment in favor of Merrill Lynch on the federal securities law claims (Pet. App. A-39 to A-50), and the court of appeals affirmed this aspect of the district court's judgment (*id.* at A-36 to A-37).

(1975), and concluded (Pet. App. A-36) that "Congress [had not] intended [in 1974] to extinguish the pre-existing private right of action which had been generally acknowledged to exist under the Act."

SUMMARY OF ARGUMENT

This Court's recent decisions emphasize that the question whether a private right of action is available under a federal statute that does not explicitly provide such a remedy is a question of congressional intent to be resolved in accordance with customary principles of statutory construction. See, *e.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15-16 (1979). Thus, the federal courts must normally determine whether Congress implicitly intended to create such a remedy in enacting a statute. In this case, however, the availability of a private remedy for commodity customers defrauded in violation of Section 4b of the Commodity Exchange Act, 7 U.S.C. (1970 ed.) 6b, was undisputed in 1974 when Congress strengthened the Act by providing new enforcement mechanisms, including additional remedies for customers. Congress was aware in 1974 that the courts had unanimously held that a private remedy was available under Section 4b.

In these circumstances, the focus of inquiry in ascertaining legislative intent must be placed, not on whether Congress intended to *create* a private remedy in 1974, but on whether Congress intended to *extinguish* an already existing private remedy. No other analysis would be consistent with the historical and legal context in which Congress acted. In 1974, Congress manifested no intention to extinguish this remedy, either by making exclusive the additional remedies that it provided or otherwise. Indeed, Congress affirmatively indicated that private rights of action should continue to be available.

At all events, the continued recognition of a private right of action under Section 4b is also mandated under the four-part test articulated by this Court in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). First, Congress clearly enacted Section 4b for the especial benefit of commodity customers. Second, Congress evidenced its intention that private rights of action should continue to be available. Third, private rights of action provide a meaningful and necessary supplement to the Commission's efforts to enforce Section 4b, the principal antifraud provision of the Act. Finally, the regulation of commodity futures trading is manifestly an area of federal concern.

ARGUMENT

I. WHEN CONGRESS AMENDED THE COMMODITY EXCHANGE ACT IN 1974, IT DID NOT INTEND TO ELIMINATE THE PRIVATE RIGHT OF ACTION THAT THE COURTS HAD UNIFORMLY RECOGNIZED FOR COMMODITY CUSTOMERS DEFRAUDED BY THEIR COMMODITY PROFESSIONALS IN VIOLATION OF SECTION 4b

1. In 1974, when Congress amended the Commodity Exchange Act (see CFTC Br. 10 & n.4), it was "undisputed that a private cause of action may be maintained under the * * * Act." *Case & Co.* v. *Board of Trade of the City of Chicago*, 523 F.2d 355, 360 (7th Cir. 1975). The first reported decision to address this question was *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440, 447 (1967), in which the United States District Court for the Northern District of Illinois, applying the "well accepted" rule of *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), held that a private damage remedy was available for commodity customers, who "fall directly within the class of persons Congress sought to protect by enacting" Section 4b of the Act, 7

U.S.C. (1964 ed.) 6b.[4] Without exception, the federal courts thereafter upheld the right of commodity customers to bring private actions for damages resulting from fraudulent conduct by commodity professionals in violation of Section 4b.[5] Moreover, it is clear that the 1974 Congress was aware of the then-current state of the law. The legislative history shows that Congress was repeatedly informed that the federal courts were adjudicating private damage claims under various provisions of the Act,[6] including fraud claims brought by customers against futures commission merchants (see CFTC Br. 11-12).[7]

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[4] The *Kardon* court implied a private remedy under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. (1940 ed.) 78j(b). This Court has subsequently confirmed the existence of that remedy. See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 730 (1975).

[5] See *Hirk* v. *Agri-Research Council, Inc.*, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,738 (N.D. Ill. 1974), aff'd in relevant part, 561 F.2d 96 (7th Cir. 1977); *Arnold* v. *Bache & Co.*, 377 F. Supp. 61 (M.D. Pa. 1973); *Gould* v. *Barnes Brokerage Co.*, 345 F. Supp. 294 (N.D. Tex. 1972); *Johnson* v. *Arthur Espey, Shearson, Hamill & Co.*, 341 F. Supp. 764 (S.D.N.Y. 1972); *McCurnin* v. *Kohlmeyer & Co.*, 340 F. Supp. 1338 (E.D. La. 1972); *Booth* v. *Peavey Company Commodity Services*, 430 F.2d 132 (8th Cir. 1970); *Anderson* v. *Francis I. duPont & Co.*, 291 F. Supp. 705 (D. Minn. 1968); *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968), modified, 430 F.2d 1202 (9th Cir. 1970).

[6] Even where the legislative history of a statute does not explicitly reflect such an awareness, "it is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-697 (1979).

[7] The general counsel of Continental Grain Co. advised Congress in 1974 that the federal courts had "already held they have jurisdiction over private complaints based on violations of the present law." *Commodity Futures Trading Commis-*

Given this legislative context, it is anomalous for petitioner to suggest (Pet. Br. 4) that the continued availability of a private right of action under the Act should depend upon whether Congress affirmatively evidenced its intention to *create* such a remedy in 1974. Quite simply, there was no reason for the 1974 Congress to create a remedy that it knew to exist. Therefore, if the intent of Congress is to be ascertained with accuracy in these circumstances,[8] the question that must be answered is whether Congress manifested any intention to *extinguish* that remedy in 1974. See CFTC Br. 12-16 & n.16. To hold otherwise would be to ignore the context in which Congress acted.

To be sure, this Court has not previously structured its inquiry in this manner because it has not had occasion to decide a private right of action case in which Congress enacted significant amendments to a statute, to strengthen enforcement of its provisions, after the existence of an implied right of action had become well-settled. CFTC Br. 12-13. In such circumstances, we submit, the burden must rest

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sion Act of 1974: Hearings on H.R. 11955 Before the House Comm. on Agriculture, 93d Cong., 2d Sess. 321 (1974) (remarks of Sheldon L. Berens). Indeed, without exception, the commodity industry representatives who testified during consideration of the 1974 amendments informed Congress that private actions could then be brought under the Act. See CFTC Br. 11-12 & n.5.

[8] In determining whether a private right of action is to be implied under a federal statute, "[t]he key to the inquiry is the intent of the legislature." *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, No. 79-1711 (June 25, 1981), slip op. 10-11. Even in ordinary circumstances, however, the historical and legal context in which Congress acted must be considered if congressional intent is truly to be ascertained. See, *e.g.*, *California* v. *Sierra Club*, No. 79-1252 (Apr. 28, 1981), slip op. 5, 8 n.7; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18 (1979).

on the party asserting that Congress intended to repudiate the legal status quo. Because petitioner contends that Congress intended to abrogate the private remedy that had previously been recognized under Section 4b, petitioner must shoulder that burden here. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, No. 79-1711 (June 25, 1981), slip op. 19 n.31.[9]

Petitioner acknowledges, of course, that Congress did not explicitly declare its intention to extinguish a private right of action in 1974, but contends (Pet. Br. 9-15, 20), in essence, that Congress' provision of an administrative reparations remedy (7 U.S.C. 18) and vesting of exclusive jurisdiction in the Commission (7 U.S.C. 2) constitute sufficient indirect evidence to show that Congress implicitly intended to accomplish this result. However, as the court of appeals correctly held (Pet. App. A-36), Congress did not manifest any intention in 1974 to extinguish a private remedy.[10] Cf. *Carlson* v. *Green*, 446 U.S.

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[9] In *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, *supra*, slip op. 16, the Court considered whether Congress in 1972, when it created express statutory remedies under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 33 U.S.C. 1251 *et. seq.*, and the Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052, 33 U.S.C. 1401 *et seq.*, intended to supplant any remedy that might be available (although not then authoritatively recognized by this Court) under 42 U.S.C. 1983. See *Maine* v. *Thiboutot*, 448 U.S. 1 (1980). The Court placed the burden of proving congressional intent on the party contending that the 1972 remedies were exclusive (*Middlesex County*, *supra*, slip op. 19 n.31), but held on the record there "that the existence of these express remedies demonstrates * * * that Congress * * * intended to supplant any remedy that otherwise would be available under § 1983" (*id.* at 19).

[10] No court of appeals has held otherwise. The Fifth Circuit, which is the only court of appeals to conclude that a

14 (1980). To the contrary, the provisions of the Act relied upon by petitioner, and the legislative history of those provisions, show that Congress intended that this remedy should continue to be available under Section 4b for customers who have been defrauded by their commodity professionals.

2. As we have previously explained (see CFTC Br. 17-22), the exclusive jurisdiction provision and the judicial savings clause that Congress added in 1974 to Section 2(a)(1) of the Act, 7 U.S.C. 2, affirmatively demonstrate Congress' intent that the federal courts would continue to adjudicate private rights of action under the Act.[11] Thus, Congress clearly ex-

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private right of action is no longer available under Section 4b, stated the question as whether the 1974 legislative history shows that Congress intended at that time to adopt or incorporate a private right of action as part of the Act. See *Rivers* v. *Rosenthal & Co.*, 634 F.2d 774, 785 (1980), petition for cert. pending, No. 80-1542 (filed Mar. 10, 1981). The Fifth Circuit acknowledged, however, that application of the approach we suggest here, and which was employed by the Sixth Circuit in this case, "very well might—indeed, probably *would*—produce a different final result" (*id.* at 785 n.17; emphasis in original).

[11] In *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n, supra*, the Court found that the particular savings clause involved there did not support the existence of a private right of action. The circumstances presented in that case, however, are distinguishable from those presented here. Unlike the savings clause in the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1365(e) (see *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n, supra*, slip op. 13 & n.26), the judicial savings clause in the Commodity Exchange Act is not limited by either its language or its legislative history. Indeed, the legislative history of this savings clause establishes that Congress enacted the clause to ensure that "nothing in the Act" (presumably including the expressly provided reparations and enforcement remedies) would affect the jurisdiction previously conferred on the courts. See S. Rep. No. 93-1131, 93d Cong.,

pected and intended that customer fraud claims under Section 4b, which had uniformly been recognized as adjudicable in the federal courts before 1974 (see pages 5-6 and note 5, *supra*), would continue to be brought in the federal courts.

Indeed, Congress evidenced its intention concerning the continued availability of the federal courts to adjudicate Section 4b claims when it deleted from the Act the provision that stated: "Nothing in * * * section [4]b shall be construed to impair any State law applicable to any transaction enumerated or described in such sections." 7 U.S.C. (1970 ed.) 6c.[12] Congress removed this provision to ensure that the preemption of state regulatory statutes that it sought to accomplish in enacting the exclusive jurisdiction provision would be complete. See S. Conf. Rep. No. 93-1194, 93d Cong., 2d Sess. 35-36 (1974).[13] However, Senator Curtis acknowledged in proposing this amendment that "Federal and State courts are

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2d Sess. 23 (1974); 120 Cong. Rec. 34737 (1974) (remarks of Rep. Poage); *id.* at 34997 (remarks of Sen. Talmadge). Moreover, in contrast to the circumstances presented in this case, Congress could not have intended that the savings clause involved in *Middlesex County* would preserve any private right of action that had previously been held to exist under the Federal Water Pollution Control Act because no such remedy had been recognized. See, *e.g.*, *Higginbotham* v. *Barrett*, 473 F.2d 745, 748 (5th Cir. 1973); *Enquist* v. *Quaker Oats Co.*, 327 F. Supp. 347, 348 (D. Neb. 1971).

[12] See Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, Section 402(d), 88 Stat. 1413.

[13] See Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 Vand. L. Rev. 1, 2 (1976). Congress was obviously aware of the decision in *Rice* v. *Board of Trade of the City of Chicago*, 331 U.S. 247, 255 (1947), in which the Court specifically relied upon this provision in holding that the Act did not preempt application of state regulatory statutes to commodity futures trading.

to retain jurisdiction" over claims arising under the federal statute, and he stated that his purpose was to ensure that "even in the cases where the * * * State courts retain jurisdiction, the Federal substantive law embodied in the Commodity Exchange Act * * * would govern" (120 Cong. Rec. 30464 (1974)). Accord, *ibid.* (remarks of Sen. Talmadge).[14]

These remarks clearly show that Congress contemplated that the state courts, pursuant to their gen-

[14] These expressions of congressional intent are irreconcilable with petitioner's assertion (Pet. Br. 39 n.61) that "state court jurisdiction, except over contract and commercial rights, has been preempted by the 'exclusive jurisdiction' of the CFTC." Indeed, that assertion is patently inconsistent with the language of the savings clause (Section 2(a)(1) of the Act, 7 U.S.C. (Supp. III) 2), which broadly preserves the jurisdiction of the courts, federal and state, without any apparent limitation. Congress certainly could have drafted the savings clause to accomplish the broad result that petitioner suggests to have been its purpose, and, if it had done so, Congress could reasonably be said to have intended not to preserve the preexisting private right of action under the Act. However, given the fact that Congress drafted the judicial savings clause without limiting it in any way, it is reasonable to conclude that it intended the savings clause to preserve the courts' jurisdiction with respect to previously recognized rights of action, among other things. Cf. *Maine* v. *Thiboutot*, *supra*, 448 U.S. at 4 (broad interpretation of statute adopted "[g]iven that Congress attached no modifiers to the phrase"). Finally, petitioner's view that the provision granting exclusive regulatory jurisdiction to the Commission has preempted adjudication of all but state law contract claims cannot be squared with the amendments passed by Congress in 1978, which made clear that state fraud statutes of general applicability had not been preempted in 1974 and thus may continue to be enforced even by state officials in state court. See 7 U.S.C. (Supp. III) 13a-2(7). See also S. Rep. No. 95-850, 95th Cong., 2d Sess. 25 (1978); H.R. Rep. No. 95-1181, 95th Cong., 2d Sess. 16 (1978). Actions may be brought under such state statutes if they are applied in a manner consistent with the Act and the Commission's regulations. See CFTC Br. 19 n.19.

eral jurisdiction, would entertain commodity claims involving the substantive standards embodied in the Act, including, of course, those contained in Section 4b. Cf. *McKnett* v. *St. Louis & S.F. Ry.*, 292 U.S. 230, 233-234 (1934). Accordingly, Congress also must have intended that the federal courts would continue to adjudicate private rights of action under Section 4b. Otherwise, customers would be able to seek judicial relief for claims under Section 4b only in the state courts, and defendant futures commission merchants would be unable to remove such cases to the federal courts under 28 U.S.C. 1441. Congress could not have intended this anomalous result with respect to claims arising under an exclusively federal regulatory scheme.[15] In fact, Congress in 1978 made explicit its preference that claims under the Act be adjudicated in the federal courts by providing that the federal courts should be the sole forum for enforcement actions brought by state officials under the Act. See Section 6d(2) of the Act, 7 U.S.C. (Supp. III) 13a-2(2); 124 Cong. Rec. S10561-S10562 (daily ed. July 12, 1978) (remarks of Sens. Bellmon and Leahy).[16]

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[15] Moreover, if petitioner's view of the exclusivity of the reparations procedure were correct (see Pet. Br. 14-15), one would have to assume, in light of Congress' view that state courts could adjudicate claims under Section 4b, that Congress intended that state court actions would be subject to removal, not to the federal courts, but to the Commission.

[16] In 1978, Congress sought to ensure that state law enforcement resources would be available to deter and punish substantial, widespread violations of the Act. Cf. 124 Cong. Rec. S10561-S10562 (daily ed. July 12, 1978) (remarks of Sens. Bellmon, Huddleston and Leahy). However, Congress did not wish to rely on the *parens patriae* doctrine "because of questions as to its general acceptability in the courts" (H.R. Rep. No. 95-1181, *supra*, at 14). Accord, S. Rep. No. 95-850, *supra*, at 25. Congress was therefore uncertain in 1978 whether

In both 1974 and 1978, therefore, Congress clearly rejected petitioner's apparent contention (Pet. Br. 14-15) that Congress intended, by granting exclusive jurisdiction to the Commission, to make the Commission the sole arbiter of legal questions under the

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meaningful state involvement in enforcing the Act would occur unless a statutory remedy for the states was expressly created. Thus, Congress enacted Section 6d of the Act, 7 U.S.C. (Supp. III) 13a-2, to make explicit the standing of state officials to sue in the federal courts and to obtain injunctive relief and damages on behalf of injured citizens.

Petitioner contends (Pet. Br. 33, 36-37) that the role assigned to the Commission in Section 6d actions supports the view that Congress intended that the Commission's approval would be required for any legal theory under which a commodity professional could be found liable for damages arising out of violations of the Act. But Congress rejected a provision that would have explicitly required prior approval by the Commission of state actions under Section 6d. See 124 Cong. Rec. S10562 (daily ed. July 12, 1978) (remarks of Sen. Bellmon). Instead, Congress provided in Section 6d(3) of the Act, 7 U.S.C. (Supp. III) 13a-2(3), merely that a state must immediately notify the Commission of any action instituted under Section 6d and that the Commission shall have the right to intervene in any such action. In Congress' view, this provision would assist the Commission in "institut[ing] its own administrative disciplinary proceeding," where the full panoply of its enforcement powers, including registration revocation and civil money penalties (see 7 U.S.C. 9), could be utilized. H.R. Rep. No. 95-1181, *supra*, at 15. Moreover, Congress authorized the states to sue to recover money damages for violations of the Act as an incentive to state officials to bring actions providing a needed supplement to the Commission's enforcement efforts. See 124 Cong. Rec. S10561-S10562 (daily ed. July 12, 1978) (remarks of Sen. Bellmon). See also *id.* at S16527 (daily ed. Sept. 28, 1978) (remarks of Sen. Leahy). The legislative history of Section 6d nowhere suggests that this provision was enacted to ensure that the Commission would be aware or approve of every damage action brought against a commodity professional under the Act.

Act, subject only to appellate review. In 1978, Congress unequivocally confirmed (S. Rep. No. 95-850, *supra*, at 25) that a coherent and uniform body of law would be developed under the Act, not only through the Commission, but also through the federal courts. Although the 1978 Congress was addressing state enforcement actions, rather than private actions, the same reasoning would necessarily apply in both cases. At all events, the court of appeals correctly concluded that (Pet. App. A-27 to A-28) "[t]he exclusive jurisdiction provision * * * should not be construed as extinguishing pre-existing private rights of action by implication since the thrust of the provision was to ensure that regulatory bodies other than the CFTC would not interfere with the orderly development and enforcement of commodities regulation."

3. When Congress amended the Act in 1974, it "sought to encourage inexpensive and expeditious adjudication of customer claims against commodity professionals by requiring the * * * [Commission] to establish a reparation procedure for the resolution of claims arising under the Act." *Rosenthal & Co.* v. *CFTC*, 614 F.2d 1121, 1123 (7th Cir. 1980). Nothing in the statute or legislative history indicates that this remedy was to become the only remedy available to commodity customers,[17] and there is no basis for

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[17] Under the reparation procedure, customers may recover compensatory damages from commodity professionals, such as futures commission merchants, who have violated any provision of the Act or the Commission's regulations. See 7 U.S.C. (& Supp. III) 18(a) and (e). Congress' determination that commodity professionals should be held liable in damages for violating the Act further distinguishes this case from *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n, supra*, in which the Court held that a private right of action could not be inferred. In that case, Congress had explicitly permitted private parties to seek only

presuming such a congressional intent merely from the fact that a reparations provision was added.[18] Indeed, with respect to other amendments that were enacted in 1974, Congress made explicit its intention that the Commission's jurisdiction should be exclusive. See CFTC Br. 17-18. That Congress never stated that the reparation procedure was intended to preclude private rights of action therefore strongly suggests that such a result was not intended. Cf. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974); *Leist* v. *Simplot*, 638 F.2d 283, 312-315 (2d Cir. 1980), cert. granted, Nos. 80-757, 80-895 & 80-936 (Feb. 23, 1981).

Moreover, the limited nature of the remedy that Congress provided in Section 14 also reflects Congress' intention that reparations would supplement, rather than supplant, private rights of action. The reparation remedy is limited in several respects. Of particular significance in the present context is the limitation contained in Section 14(i) of the Act, 7 U.S.C. 18(i), which provides that the Commission may adjudicate in reparations only those claims that arose after January 23, 1975.[19] Because respondents'

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injunctive relief under the two statutes involved, and Congress had clearly indicated that damage awards would be inappropriate. See slip op. 15 n.27.

[18] In 1978, Congress noted that the purpose of the reparations procedure was to provide an expeditious and simple remedy "analogous to the operation of a small claims court." S. Rep. No. 95-850, *supra*, at 11, 16. Small claims courts are designed to provide an inexpensive forum for resolving relatively minor disputes without undue delay, but plaintiffs generally retain the right to file their claims, especially larger ones, in other courts if they wish.

[19] See *Barker* v. *Commodity Management Systems, Inc.*, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,432 (June 2, 1977) and ¶ 20,634 (June 21, 1978), petition for review dismissed *sub nom. Barker* v. *CFTC*, No.

claim arose before that date, petitioner is simply wrong in asserting that reparations provides "individuals such as the Currans a full and complete remedy" (Pet. Br. 12). If the reparations remedy were exclusive, respondents would have no remedy under the Act.[20] Similarly, the reparations remedy is limited in that the Commission may adjudicate claims based on violations of the Act or Commission regulations, but not state law claims. 7 U.S.C. (Supp. III) 18(a). In contrast, as a matter of pendent jurisdiction, a federal court could adjudicate the merits of any state law claim that a customer might present together with his claim under the Act. If, as petitioner contends, Congress has extinguished

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78-3141 (5th Cir. Nov. 3, 1978), cert. denied, 440 U.S. 980 (1979).

[20] Given Congress' concern in 1974 with increased cheating of customers (see H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 34 (1974)), it is inconceivable that it intended to immunize fraudulent conduct occurring on or before January 23, 1975. That result would necessarily follow, however, if Congress intended in 1974 to extinguish previously recognized private rights of action. Moreover, Congress recognized that the 1974 amendments might affect proceedings or investigations of state and federal regulators who were then enforcing statutes that would be preempted when the exclusive jurisdiction provision took effect. See 120 Cong. Rec. 34737 (1974) (remarks of Rep. Poage); *id.* at 34997 (remarks of Sen. Talmadge). To remedy this problem, Congress enacted a provision ensuring that such proceedings could continue unabated. See Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, Section 412, 88 Stat. 1414. If Congress had understood that the reparations procedure was to be exclusive and that it would therefore have a similar impact upon private claims arising on or before January 23, 1975, Congress surely would have made similar provision for assuring the viability of those claims. Congress' failure to enact such a provision is strong evidence that it did not intend reparations to supplant the preexisting private right of action.

the private right of action under Section 4b, a customer with claims against his futures commission merchant based on violations of both the Act and, for example, state contract law, would be required to file both a reparations claim with the Commission and a contract claim in state or federal court. It is difficult to believe that Congress intended that customers should have to vault two separate hurdles to secure relief. Cf. *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 474 (1959).[21]

In addition, the Commission is required to entertain only those reparation complaints that, "in the opinion of the Commission," allege facts warranting such action. See Sections 14(a) and 14(b), 7 U.S.C. (Supp. III) 18(a) and 18(b). Thus, Congress has granted the Commission apparently unreviewable discretion to determine whether a customer's complaint warrants a reparation proceeding. See *Leist* v. *Simplot*, *supra*, 638 F.2d at 312. In petitioner's view,

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[21] Unless a private right of action continues to be available, the 1974 legislation will also result in complicating unnecessarily the adjudication of commodity claims. For example, futures commission merchants often bring breach of contract actions against customers who, by failing to meet margin calls, incur debit balances in commodity accounts. See, *e.g.*, *Paine, Weber, Jackson & Curtis, Inc.* v. *Rosciszewski*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,175 (S.D. Cal. Apr. 16, 1981). Even under petitioner's view (Pet. Br. 39), such suits may be brought in state court or, if diversity of citizenship exists, in federal court. Absent a private right of action under the Act, the defendant customer may be unable to bring a counterclaim alleging that the deficiency in his account (as well as the amount of his own damages) resulted from, for example, fraudulent conduct committed by the futures commission merchant in violation of Section 4b. Thus, the customer would be required to bring his Section 4b claim in a reparation proceeding, while being required at the same time to defend a lawsuit involving the same subject matter.

if the Commission were to determine that a complaint did not warrant a reparation proceeding, the customer would be unable to obtain any adjudication of his claim under the Act.

The legislative history also supports the conclusion that Congress intended the reparation remedy to be supplementary. The reparation provisions in the House bill would have authorized any party aggrieved by a Commission reparation decision to appeal that decision to a federal district court. See H.R. 13113, 93d Cong., 2d Sess. § 105 (1974). The aggrieved party would have been entitled to "a trial de novo," which would proceed "like other civil suits for damages," except that the Commission's order would be "prima facie evidence of the facts therein stated." H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 7, 121 (1974).

If this provision had been enacted, there might be some basis for concluding that Congress implicitly intended to substitute reparations for private rights of action. The judicial review provision proposed by the House was similar to those available under other federal reparation schemes. See 7 U.S.C. 210 and 499f. In those schemes, however, a private right of action was explicitly made an alternative to reparations. See 7 U.S.C. 209 and 499e. Thus, it might reasonably have been argued that, by not explicitly providing for such an alternative in Section 14, Congress indicated its intent that all private claims should be referred to the Commission, at least in the first instance, thereby eliminating direct access to the courts. Indeed, the de novo review provision could have been read to indicate that Congress intended to extend beyond contract markets the Court's primary jurisdiction holding in *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973), to embrace all dam-

age claims against commodity professionals under the Act.[22]

However, Congress chose not to adopt the de novo review provision. The Conference Committee rejected this approach as well as the Senate approach, which would have authorized review of Commission reparation decisions by district courts under a substantial evidence standard. See S. Rep. No. 93-1131, 93d Cong., 2d Sess. 5 (1974). Instead, the conferees determined to limit the district courts' role in this particular scheme to the enforcement of reparation awards. 7 U.S.C. 18(f). Substantive review of Commission reparation decisions was lodged with the courts of appeals. 7 U.S.C. 18(g). See S. Conf. Rep. No. 93-1194, *supra*, at 7, 34-35. By enacting these provisions, Congress effectively provided parallel review schemes for Commission reparations cases and district court adjudications of private claims under the Act, and thus appears to have intended that reparations should be considered as an alternative to private rights of action.[23] This view is consistent, of course, with the conferees' adoption of the judicial savings clause that the Senate Committee had added, to preserve, among other things, private rights of

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[22] The absence of contract markets from the list of potential respondents in reparation proceedings (7 U.S.C. (Supp. III) 18(a)) may be explained under this view because this Court already had recognized in *Deaktor* the application of the doctrine of primary jurisdiction to private claims against contract markets arising under the Act.

[23] Although the House Committee report contains certain suggestions that only reparations and arbitration would be available as customer remedies (H.R. Rep. No. 93-975, *supra*, at 22), the Conference Committee's rejection of the de novo review approach of the House bill clearly deprives those suggestions of any weight that otherwise might be attributed to them.

action under the Act (see CFTC Br. 17-18). These factors plainly show that Congress intended reparations and private rights of action to be alternative customer remedies.[24]

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[24] By continuing to make available a private judicial remedy as an alternative to reparations, Congress effectively accomplished the same election of remedies provided in other federal reparation schemes. See, *e.g.*, 7 U.S.C. 209 and 499e. To be sure, commodity industry representatives complained in 1974 that, in view of the undisputed availability of a private right of action, the enactment of arbitration and reparation schemes (see 7 U.S.C. 7a(11) and 18) would be superfluous and might result in duplicative or inconsistent adjudications of customer claims. See CFTC Br. 12-13. However, Congress was not moved by this argument, and, as the court of appeals recognized (Pet. App. A-33), the Commission answered the industry's objection by construing the Act to require an election of remedies. See 41 Fed. Reg. 3994, 3995 n.5 (1976). Thus, "the utilization of either an arbitration proceeding or civil court litigation is a waiver of the remedies available under the reparation procedures if the arbitration proceeding or court litigation is pursued to a final decision on the merits." *Id.* at 3994. See also 17 C.F.R. 12.21(a)(7), 12.22.

The nature and background of the arbitration remedy mandated by the 1974 amendments also support the Commission's view. The 1974 amendments require that contract markets provide customers with voluntary arbitration procedures to settle their claims and grievances—which need not involve violations of the Act—against contract market members or employees. See 7 U.S.C. 7a(11). Claims subject to these procedures that involve violations of the Act cannot exceed $15,000. 7 U.S.C. 7a(11)(ii). This amount in controversy limitation was enacted in direct response to testimony by members of the commodity industry that it would be appropriate for the courts to continue to adjudicate larger claims against futures commission merchants. See *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess., Pt. 1, 403 (1974) (remarks of Alvin W. Donahoo).

That Congress did not extinguish private rights of action in 1974 is further supported by contemporaneous judicial and scholarly opinion that the statutory grievance procedures enacted in 1974 were not intended to be the exclusive forums available to commodity customers.[25] Indeed, the fact that the question was first raised in this case, not by petitioner, but by the court of appeals, demonstrates the extent to which the question was considered to be settled. Not only did petitioner fail to make an appropriate motion in this litigation, but in commenting on the Commission's proposed arbitration rules in 1976, petitioner stated that commodity customers have "three alternatives[:] go to court, reparations or arbitration."[26] Similarly, in 1978 Congress was advised by representatives of the futures industry that a private right of action continued to be available under the Act. See *Reauthorization of the Commodity Futures*

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[25] See, *e.g.*, *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8 (7th Cir. 1977); *Bache Halsey Stuart, Inc.* v. *French*, 425 F. Supp. 1231, 1234 n.4 (D.D.C. 1977); *Milani* v. *ContiCommodity Services, Inc.*, 462 F. Supp. 405, 407 (N.D. Cal. 1976). See also Hudson, *Customer Protection in the Commodity Futures Market*, 58 B.U.L. Rev. 1, 39-40 (1978); Schneider, *Commodities Law and Predispute Arbitration Clauses*, 6 Hofstra L. Rev. 129, 133 (1977); Bromberg, *Commodities Law and Securities Law—Overlaps and Preemptions*, 1 J. Corp. L. 217, 287 (1976); Johnson, *The Commodity Futures Trading Commission Act: Preemption as Public Policy*, 29 Vand. L. Rev. 1, 40 (1976).

[26] *Hearing Before the Commodity Futures Trading Commission on Arbitration and Other Dispute Settlement Procedures* 97 (Mar. 5, 1976) (statement of Steven Metz, Esq., on behalf of Merrill Lynch, Pierce, Fenner & Smith, Inc.); see also *Memorandum Regarding Proposed Antifraud Rules*, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,044 at 20,630 n.* (May 16, 1975) (Memorandum of Law of the New York Cocoa Exchange, Inc., and the New York Coffee and Sugar Exchange, Inc.).

Trading Commission: Hearings Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry, 95th Cong., 2d Sess., Pt. 2, 581 (1978) ("*1978 Senate Hearings*") (remarks of Messrs. Gelderman and Clagett on behalf of the Futures Industry Association); *id.* at 597 (remarks of Frederick F. Horn).[27] There is no evidence to suggest that Congress disagreed with this view, which was also expressed by the Commission.[28]

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[27] To the extent that the legislative history of the Futures Trading Act of 1978, Pub. L. No. 95-405, 92 Stat. 865, refers to private rights of action, members of Congress indicated their understanding that these judicial remedies would continue to be available. See 124 Cong. Rec. S16527 (daily ed. Sept. 28, 1978) (remarks of Sen. Leahy); *id.* at S10537 (daily ed. July 12, 1978) (remarks of Sen. Huddleston).

[28] The Commission has adhered to this view since its inception in 1975. See 40 Fed. Reg. 55667 n.10 (1975). It is well-established, of course, that deference should be given to the contemporaneous construction of a statute by those whom Congress has " 'charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961), quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). Moreover, an agency's construction of its statute is entitled to special deference when that construction has weathered the test of time (see *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972)), and when Congress has revisited and amended the statute without expressing any disagreement with the agency's view. See *EEOC* v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981), slip op. 9-10 n.17; *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). Indeed, because of concern with the Commission's backlog of reparations claims, Senator Huddleston, the sponsor of the 1978 amendments, suggested that perhaps Congress should "strike out the current authority for reparations proceedings" in order "to get a lot of this out of [the Commission's] shop

In sum, there is no persuasive evidence that even suggests that Congress intended in 1974 to extinguish the private right of action that uniformly had been recognized under Section 4b of the Act. The mere fact that Congress provided additional remedies in 1974 cannot itself suffice to fill that void, particularly where, as here, there is affirmative evidence to show that Congress did not intend such additional remedies to be exclusive. Indeed, because Congress added the additional remedies expressly to *strengthen* the enforcement mechanism of the Act (see *Leist* v. *Simplot*, *supra*, 638 F.2d at 311), and because private rights of action are an essential enforcement device, it would be wholly inconsistent with Congress' intent in enacting the 1974 amendments to conclude that the private civil remedy was implicitly withdrawn.

II. THE RECOGNITION OF A PRIVATE RIGHT OF ACTION UNDER SECTION 4b IS WARRANTED EVEN UNDER THE TEST OF *CORT* v. *ASH*

Even if this Court should conclude that, despite the unique circumstances presented here, the test articulated in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), provides the appropriate framework for ascertaining congressional intent, the continued availability of a private remedy under Section 4b is warranted because that result is supported by reference to each of the four factors identified in *Cort*.

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and into the courts." *1978 Senate Hearings*, *supra*, Pt. 2 at 77, 79. In keeping with its long-standing interpretation, the Commission replied that it favored maintaining the reparations remedy as an inexpensive alternative to litigation. *Id.* at 79 (remarks of Commissioner Read P. Dunn, Jr.). See also *id.* at 267, 410.

1. The threshold inquiry under *Cort* is whether the party asserting the right is within "the class for whose especial benefit the statute was enacted" (422 U.S. at 78). The answer to this question must first be sought in the language of the statute. See *California* v. *Sierra Club*, No. 79-1252 (Apr. 28, 1981), slip op. 6. If the statute is drawn with an "unmistakabl[e] focus on any particular class of beneficiaries whose welfare Congress intended to further," then Congress may be said to have intended to confer federal rights upon those beneficiaries (*ibid.*).

The focus of Section 4b is unambiguous; it seeks to protect commodity customers from fraud. In pertinent part, Section 4b makes it unlawful "for any person, in or in connection with any order to make, or the making of, any * * * [futures contract] for or on behalf of any other person * * * (A) to * * * defraud such other person." 7 U.S.C. 6b.[29] Section 4b may therefore be violated only if the party committing the alleged fraud was acting "for or on behalf of" the defrauded party. Commodity professionals act "for or on behalf of" their customers in connection with futures transactions. See, *e.g.*, page 2, note 2, *supra*. Accordingly, Section 4b was directed precisely at protecting customers from being defrauded by their commodity professionals.[30]

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[29] The other prohibitions of Section 4b also focus upon acts committed by any person "acting for or on behalf of any other person" that adversely affect "such other person." For example, Section 4b also makes it unlawful "willfully to make or cause to be made to such other person any false report or statement thereof" (7 U.S.C. 6b(B)) and "willfully to deceive or attempt to deceive such other person" (7 U.S.C. 6b(C)).

[30] When Section 4b was enacted in 1936, it was directed only at violations by contract market members and their employees or agents. 7 U.S.C. (1940 ed.) 6b. Congress amended

The legislative history of Section 4b confirms this view. Congress has repeatedly emphasized that the goal of Section 4b is to protect commodity customers. Indeed, when the House Committee on Agriculture first reported favorably on a bill prohibiting fraud in connection with futures trading, it explained that such legislation was needed to "protect the rights of customers as fully as possible." H.R. Rep. No. 1551, 72d Cong., 1st Sess. 3 (1932).[31] Thereafter, the Congress that ultimately enacted Section 4b in 1936 reiterated this fundamental purpose. See S. Rep. No. 1431, 74th Cong., 1st Sess. 3 (1935) ("trade practices involving the cheating of customers * * * must be dealt with more adequately than is possible

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Section 4b in 1968 to broaden its coverage to include "any person" acting in connection with futures transactions. Pub. L. No. 90-258, Section 5, 82 Stat. 27. Recognizing that some futures commission merchants are not members of exchanges, the Department of Agriculture proposed this amendment to "give customers who deal in commodity futures with non-members [of exchanges] the full protection of the law." *Hearings on H.R. 11930 and H.R. 12317 Before the House Comm. on Agriculture*, 90th Cong., 1st Sess. 48 (1967) (statement of George L. Mehren). See also S. Rep. No. 947, 90th Cong., 2d Sess. 6 (1968).

[31] The House Committee inserted in the antifraud provision the significant language "for or on behalf of." Compare H.R. 12287, 72d Cong., 1st Sess. § 4b (May 24, 1932), with H.R. 7608, 72d Cong., 1st Sess. § 4A (Jan. 13, 1932). The antifraud provision that was eventually enacted as Section 4b was virtually identical to the provision that the House Committee adopted in 1932. Compare H.R. 12287, *supra*, at § 4b, with ch. 545, Section 5, 49 Stat. 1493-1494. In fact, by 1936, the provisions of Section 4b were "not in controversy at all." 80 Cong. Rec. 7911 (1936) (remarks of Sen. Norris). Congress' intent in enacting Section 4b therefore crystallized in 1932, and the House Committee's views at that time are entitled to considerable weight. Cf. *Transcontinental & Western Air, Inc.* v. *CAB*, 336 U.S. 601, 605 n.6 (1949).

under present law"); H.R. Rep. No. 421, 74th Cong., 1st Sess. 5 (1935) ("Section 4b makes it unlawful * * * to cheat, defraud, or deceive the customer").[32] Thus, even if the language of Section 4b were at all ambiguous, its legislative history clearly shows that Congress intended to grant customers, the beneficiaries of the antifraud prohibition, the right to be free from fraudulent conduct by their commodity professionals.[33]

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[32] See also H.R. Rep. No. 1522, 73d Cong., 2d Sess. 5 (1934); 78 Cong. Rec. 10452 (1934) (remarks of Rep. Sabath). *Regulation of Grain Exchanges: Hearing on H.R. 8829 Before the House Comm. on Agriculture*, 73d Cong., 2d Sess. 10 (1934) (remarks of J.M. Mehl); *id.* at 265 (remarks of Dr. J.W.T. Duvel).

[33] Of course, Section 4b was not drafted explicitly to confer on customers a "right" to be free from fraudulent conduct by their commodity professionals. Cf. *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 690 n.13. Instead, Section 4b protects customers by imposing a duty on commodity professionals not to defraud their customers. Similarly, the statute at issue in *Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33, 37, 39-40 (1916), imposed a duty to provide secure ladders on railroad cars. Nonetheless, in *Cort* v. *Ash*, *supra*, 422 U.S. at 78, this Court described the statutory duty in *Rigsby* as "creat[ing] a federal right in favor of" the party for whose especial benefit Congress enacted the statute imposing the duty. Section 4b likewise creates a federal right in favor of the class for whose especial benefit it was enacted, commodity customers. See *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 46-47 (1979); *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192, 204 (1944); *Moore* v. *Chesapeake & Ohio Ry.*, 291 U.S. 205, 215 (1934). See also Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 Yale L.J. 16, 31 (1913). Compare *California* v. *Sierra Club*, *supra*, slip op. 1, 7 (statute prohibiting "the creation of any obstruction * * * to the navigable capacity of any waters of the United States" is "designed to benefit the public at large" and is "not concerned with the rights of individuals").

2. Where, as here, " 'it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such a cause of action would be controlling.' " *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 694, quoting *Cort* v. *Ash*, *supra*, 422 U.S. at 82 (emphasis in original). Thus, under the second prong of the *Cort* test, petitioner must bear the burden of showing Congress' "explicit purpose to deny" a private cause of action under Section 4b. To meet this burden, petitioner relies upon Congress' enactment in 1974 of express remedies under the Act, and thus argues that Congress thereby indicated its intention to extinguish the private right of action that had previously been held to exist. This reliance is misplaced because, as this Court has recently said, "[t]he creation of one explicit mode of enforcement is not dispositive of congressional intent with respect to other complementary remedies." *California* v. *Sierra Club*, *supra*, slip op. 7 n.6. See also *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, 444 U.S. at 29 n.6 (White, J., dissenting).[34]

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[34] This Court's holding in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, is distinguishable because it is based upon certain aspects of the Investment Advisers Act of 1940, 15 U.S.C. 80b-1 *et seq.*, that have no parallel here. In *Transamerica*, the Court noted that the Investment Advisers Act, in sharp contrast to other federal securities statutes, contained no express damage remedy whatsoever, and found that this fact "strongly suggests that Congress was simply unwilling to impose any potential monetary liability to a private suitor" (444 U.S. at 21). See also *Middlesex County Sewerage Authority* v. *National Sea Clammers Ass'n*, *supra*, slip op. 15 n.27. In addition, the Court noted that Congress had, in the course of developing that Act, specifically deleted a grant of jurisdiction to the courts to entertain "actions at law brought to enforce any liability," which would have included private

In any event, as we have shown, Congress acted in 1974 to preserve, not foreclose, the private rights of action that had been judicially recognized. See CFTC Br. 17-26; pages 9-23, *supra*. In fact, Congress was alerted to the argument that petitioner now makes—that the enactment of reparations foreclosed private rights of action. In order to avoid that result, Congress was urged to include "explicit language in the statute that Federal and State courts are still open if a complainant prefers to go to trial there." *Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 Before the Senate Comm. on Agriculture and Forestry*, 93d Cong., 2d Sess., Pt. 3, 737 (1974) (statement of Roy A. Schotland). Congress enacted the broad judicial savings clause in Section 2(a)(1) of the Act, 7 U.S.C. 2, to accomplish this purpose, among others. See CFTC Br. 17-22. Accordingly, even if it were necessary to show such an intent, the language and legislative history of the 1974 amendments demonstrate that Congress intended that customers should be able to enforce Section 4b in private damage actions.

3. The third prong of the *Cort* test requires consideration of the question whether a private right of action is consistent with the underlying purposes of the statute. Where the remedy "is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 703. The continued avail-

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damage suits. See 444 U.S. at 21-22. Here, of course, Congress expressly approved the imposition of monetary liability on any commodity professional who violates the Act (7 U.S.C. (Supp. III) 13a-2, 18(a)), and explicitly preserved the jurisdiction of the courts to entertain damage suits (7 U.S.C. (Supp. III) 2).

ability of private rights of action under the Act satisfies this standard.

Historically, the primary goal of the Act has been "to insure fair practice and honest dealing on the commodity exchanges." H.R. Rep. No. 421, *supra*, at 1. See also S. Rep. No. 93-1131, *supra*, at 1. In 1974, Congress perceived that the realization of this purpose might be jeopardized as growing numbers of the "general public" began trading in the futures markets (*id.* at 18), given the fact that "such trading is now poorly regulated, if it is regulated at all." 120 Cong. Rec. 34997 (1974) (remarks of Sen. Talmadge). Congress was particularly concerned about "confidence games," "fraud," and the "cheating of customers and other sharp practices not easily discoverable by the victims." H.R. Rep. No. 93-975, *supra*, at 34. Congress therefore enacted "remedial legislation designed to correct certain abuses which * * * exist in areas that will now come within the jurisdiction of the Commodity Futures Trading Commission." 120 Cong. Rec. 34997 (1974) (remarks of Sen. Talmadge).

The Commission's efforts to achieve this congressional objective are necessarily limited by budgetary constraints. Private rights of action provide a crucial supplement to the Commission's attempts to enforce the remedial provisions of the statutory scheme, particularly the antifraud provision of Section 4b of the Act, 7 U.S.C. 6b, and therefore help to deter those practices that Congress sought to correct in 1974. Moreover, by providing an alternative to the administrative reparations procedure that Congress established in 1974 (7 U.S.C. 18), private rights of action under Section 4b divert from the administrative process more complex claims that customer plaintiffs may prefer to litigate in the federal courts (where, among other things, broader discovery is available).

Thus, the continued availability of the federal courts to adjudicate claims under the Act permits the Commission to decide more quickly the cases before it and thereby assists in fulfilling Congress' goal that reparations "bring about inexpensive and expeditious adjudication of customer claims." S. Rep. No. 95-850, *supra*, at 11.[35]

As petitioner concedes (Pet. Br. 37), one of the purposes of the 1974 amendments was to provide protection and redress for persons who participate in futures trading. This purpose is reflected both in the statutory grievance procedures enacted in 1974 (7 U.S.C. 7a(11), 18) and in the state enforcement procedures that were enacted in 1978, which contemplate class actions on behalf of commodity customers to recover monetary damages. See 7 U.S.C. (Supp. III) 13a-2. See also 124 Cong. Rec. S10561-S10562 (daily ed. July 12, 1978) (remarks of Sen. Bellmon). In enacting and amending this statute, "Congress was * * * concerned with the rights of individuals." *California* v. *Sierra Club*, *supra*, slip op. 7. Thus, the Commission has always maintained that the continued availability of private rights of action is both plainly consistent with this congressional concern and essential to the effectuation of the statutory policy.[36] As one court has recently held, "[t]he implica-

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[35] In fiscal year 1980 the Commission docketed 741 reparation complaints and closed 278. At the end of that fiscal year, 1203 reparation complaints were still pending before the Commission. See *1980 Commodity Futures Trading Commission Annual Report* 26-28. See also S. Rep. No. 95-850, *supra*, at 16.

[36] The Commission has consistently and unequivocally taken the position that a private right of action "will provide effective assistance to achieving the statutory purposes." *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 707. See page 22, note 28, *supra*. As the expert agency charged by Congress

tion of a private right of action is consistent with [Congress'] goal, as it adds another means by which a party may strike out at fraudulent conduct in the trading of commodities. * * * No showing has been made that adding this weapon to the enforcement arsenal will impede the government's efforts to regulate the market." *Wichelman* v. *Monex International, Ltd.*, 2 Comm. Fut. L. Rep. (CCH) ¶ 21,228 at 25,121 (N.D. Cal. July 24, 1981).

4. The final question to be considered under the *Cort* test is whether a private right of action "is within the federal domain of interest." *California* v. *Sierra Club*, *supra*, slip op. 10. The substantial federal interest in the adjudication of Section 4b fraud claims by commodity customers against their futures commission merchants is unambiguously reflected in the exclusive jurisdiction provision of Section 2(a)(1) of the Act, 7 U.S.C. 2. Not only is this subject matter not one that is relegated to state law (see *Cort* v. *Ash*, *supra*, 422 U.S. at 84-85), but Congress has precluded the application of state regulatory law. In sum, this is an area of substantial federal concern.

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with exclusive administration of the regulatory scheme of the Act, the Commission's view is, in this regard, entitled to substantial weight. Compare *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 41 n.27 (1977).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 80-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Petitioner,

vs.

J. J. CURRAN and JACQUELYN L. CURRAN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE ROSENTHAL & COMPANY

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MOTION OF ROSENTHAL & COMPANY FOR LEAVE TO FILE ITS BRIEF AS AMICUS CURIAE

Rosenthal & Company moves this Court pursuant to Rule 36 of the Supreme Court Rules for leave to file its brief as an *Amicus Curiae*. Petitioner Merrill Lynch, Pierce, Fenner & Smith, Inc. has consented to this filing of an *Amicus* brief by Rosenthal & Company. However, the Respondents have not consented.

Rosenthal & Company is making this filing at this time because only in late September 1981 did the case of *Middlesex County Sewerage Authority v. National Sea*

Clammers Association, ... U.S. ....., 101 S. Ct. 2615 (June 25, 1981) come to the attention of Rosenthal's counsel.

Counsel for Rosenthal believes that whereas the opinion of the United States Court of Appeals for the Fifth Circuit in *Rivers v. Rosenthal & Company*, 643 F.2d 774 (1980) petition for cert. pending, No. 80-1542, provides a scholarly analysis of the legislative history, that the most recent *Middlesex County* opinion signals a new and helpful method to be used by this Court for analyzing the legislative process.

In support of this Motion for Leave to File as *Amicus Curiae* in this particular cause, Rosenthal & Company asserts as follows:

1. Rosenthal & Company ("Rosenthal") is a Chicago-based commodity futures brokerage firm which engages as a commodities broker or futures commission merchant ("FCM") in transactions on domestic and international commodity markets.

2. Rosenthal is directly affected by the issues raised by this appeal for a number of reasons:

a. Rosenthal is presently litigating before this Court the appeal from the decision in *Rivers v. Rosenthal & Company*, 634 F.2d 774 (5th Cir., 1980). As the prevailing party before the Fifth Circuit, Rosenthal has opposed the petition for certiorari filed March 10, 1981 (No. 80-1542). The Fifth Circuit dealt with the exact question which was certified for review here, but the Court of Appeals concluded that no private right of action could be implied under the Commodity Exchange Act ("CEA"). Should the instant case be decided differently it would directly and adversely affect Rosenthal's position in the *Rivers* case and it would do so without Rosenthal being allowed to respond in its own behalf.

b. As an FCM, Rosenthal is subject on a continuing basis to the regulatory provisions of the CEA, and to the rules and regulations promulgated thereunder by the CFTC. The issue raised by this Appeal directly affects the relationships between Rosenthal and its customers.

c. The decision in this Appeal will impact the procedures governing the resolution of disputes between commodities brokers and their customers in the future. If a private right of action is implied, resort to CFTC conducted reparations procedure and to other non-judicial means for resolving disputes, such as arbitration will be effectively undermined; the long term cost of resolving customer complaints will increase; and the clear alternative among the remedies offered by Congress will be substantially confused.

3. Rosenthal seeks to file an *amicus curiae* brief because it believes certain important questions of law have not been adequately presented in the briefs filed with the Court so far. These questions concern (1) the application of the test for determining Congressional intent as it has been recently developed by the Court, and (2) the application of the doctrine of reenactment to the 1974 and 1978 Amendments to the CEA.

4. Rosenthal believes these questions of law have not been adequately presented because no brief has adequately explored the significance of the *Middlesex County Sewerage Authority v. National Sea Clammers Association*, ... U.S. ....., 101 S. Ct. 2615 (1981) in relation to the legislative history of the 1974 and 1978 Amendments to the CEA, and because only one brief, the one filed by the CFTC, explores the application of the doctrine of reenactment. The CFTC has raised this question for the first time and argues a position adverse to Rosenthal's interest.

5. Rosenthal's *amicus curiae* brief satisfies both deficiencies. The *Middlesex County* opinion, as Rosenthal submits, further clarifies the Court's developing analysis for determining the implication of private damage claims. Rosenthal's brief relates the analysis used in *Middlesex County* to the prior opinions issued by the Court on this question deriving, Rosenthal believes, a new and helpful method for analyzing the legislative process. No other brief has argued the relevance of the *Middlesex County* opinion; in fact, one brief, the brief filed by the CFTC, attempted to diminish its clear guidance and assistance here. In its brief Rosenthal also seeks to assist the Court by including crucial passages from the legislative history at issue here which have not been referred to nor reproduced by any other party.

6. Rosenthal is especially concerned with the application of the doctrine of reenactment to the 1974 and 1978 Amendments to the CEA. The recently filed CFTC brief has raised this question for the first time. No party has argued against its application. Rosenthal is concerned lest the doctrine be applied by the Court and a private right be thus implied. In its brief, Rosenthal explores at great depth the doctrine and its exceptions concluding that the doctrine is inapplicable. Reenactment was never mentioned in the legislative history nor ever seriously pressed by any party until now.

7. Unless Rosenthal is allowed to file its *amicus curiae* brief, the Court will have no brief before it setting forth the significance of the *Middlesex County* case for the instant appeal nor will it have both sides of the legal issue arising from the CFTC's contention that the doctrine of reenactment governs.

For the foregoing reasons, Rosenthal respectfully moves this Court for leave to file its *amicus curiae* brief.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the Commodity Exchange Act ("CEA") creates an implied private right of action for violations of the CEA?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Petitioner,

VS.

J. J. CURRAN and JACQUELYN L. CURRAN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF OF AMICUS CURIAE ROSENTHAL & COMPANY

INTEREST OF ROSENTHAL & COMPANY

Rosenthal & Company ("Rosenthal") is a Chicago-based commodity futures brokerage firm which engages as a commodities broker or futures commission merchant ("FCM") in transactions on domestic and international commodity markets.

Rosenthal is interested in and directly affected by the issues raised by this appeal for a number of reasons. First, as an FCM, Rosenthal is subject on a continuing basis to the regulatory provisions of the Commodity Exchange Act ("CEA") and to the rules and regulations promulgated thereunder by the Commodity Futures Trading Commission ("CFTC"). The issue raised by this appeal, namely whether a cause of action for damages in federal district court will be implied under the CEA in favor of private parties, is one which directly affects Rosenthal's business and the legal relationships between Rosenthal and its customers.

Secondly, Rosenthal is presently litigating the exact question certified for review in the above captioned appeal in another appeal lodged before this Court, [*Rivers v. Rosenthal & Company*, 634 F.2d 774 petition for cert. pending, No. 80-1542 (filed March 10, 1981)], and Rosenthal's position will thus be directly affected by the ruling in this case.

Finally and most importantly, Rosenthal is interested in the impact that the decision in this case may have on the procedures that will govern the resolution of disputes between commodities brokers and their customers in the future. The issue in this case affects rights beyond those of the immediate parties. If the Sixth Circuit's decision in this case is upheld and private damage actions in commodities transactions become generally available,

resort to the CFTC conducted reparations procedure and to other non-judicial means for resolving disputes, such as arbitration, will be effectively undermined. *Sacks v. Reynolds Securities, Inc.*, 593 F.2d 1234, 1245 (D.C. Cir., 1978). The long term cost of resolving customer complaints will increase, and the clear alternative among the remedies offered by Congress will be substantially confused. For these reasons, Rosenthal has sought leave to file this brief as *amicus curiae* in support of the position of Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") Petitioner herein.

SUMMARY OF ARGUMENT

Briefly, it is Rosenthal's position that no private right of action should be implied under the CEA. Rosenthal contends that Congressional intent to create a private cause of action under the CEA is not shown by the legislative history of the CEA and is in fact inconsistent with the structure and purpose of the statute and that the CFTC's use of the reenactment doctrine and the doctrine of implied repeal is misapplied in this case. Rosenthal concludes that the implication of a cause of action in federal court for money damages under a statute which already specifically provides an administrative forum in which this type of relief is available is an impermissible extension of the implication doctrine and an invasion of the prerogatives of Congress.

ARGUMENT

I.

CONGRESS DID NOT INTEND THE IMPLICATION OF PRIVATE ACTIONS PURSUANT TO SECTION 4b, NOR THE ADOPTION OF SUCH A PRACTICE BY REENACTMENT.

Petitioner and the CFTC make two arguments. First, they argue that a private damage remedy was available to commodities customers under the CEA prior to 1974 and that when Congress amended the CEA in 1974, it intended this remedy to continue to be available. Second, they argue that the recognition of a private right of action under the CEA is warranted under the test of *Cort v. Ash*, 422 U.S. 66 (1975). Rosenthal responds here only to the first argument regarding the reenactment doctrine. The arguments based on the *Cort v. Ash* test have been explored in depth by the briefs filed by the parties and *amici* as well as by the opinions of the Fifth Circuit in *Rivers v. Rosenthal & Company, supra*, and the Second Circuit in *Leist v. Simplot*, 638 F.2d 283, cert. granted, Nos. 80-757, 80-895 and 80-936 (February 23, 1981).

In its *amicus* brief, the CFTC argues in the alternative. On the one hand the CFTC contends that the 1974 Amendments to the CEA preserved, with little comment from Congress, a private right of action on the theory of the doctrine of reenactment. On the other hand, the CFTC contends that Congress indicated its intent to preserve the private right in the jurisdictional savings clause found in the 1974 Amendments. By these arguments the *amicus* seeks to perform a sleight of hand. Rather than examine the expressed intent of Congress, the CFTC hopes to lead the Court into deciding this case on a long since discredited principle of law. Both of the CFTC's arguments are based upon the proposition that

private implication must be assumed from Congress' silence or inattention so long as a federal law has been violated and someone was injured. The CFTC hopes to perform this sleight of hand by erecting false issues based on the burden of demonstrating Congressional interest.

Rosenthal opposes these contentions. Its arguments are twofold. First, Congress never intended the implication of a private right of action under the CEA as amended in 1974 and 1978. Second, Congress never intended to adopt the implication of a private right of action by reenactment with the 1974 and 1978 Amendments to the CEA. The intent of Congress governs both issues. Whether private rights are to be implied pursuant to new federal legislation or whether they are to be adopted pursuant to legislative reenactment, the question is the same. Did Congress affirmatively indicate it?

Such an inquiry falls to both parties. If neither finds an affirmative indication of intent, then the advantage is lost to the party claiming under the proposed right.

A. Congress Never Intended That A Private Right Of Action Be Implied Under The CEA As Amended In 1974 And 1978.

The CFTC reaches the conclusion that Congress intended the implication of a private damage remedy from the language of the jurisdictional savings clause of the CEA as amended in 1974 and 1978. It attempts to bolster this conclusion by reference to a few cryptic and isolated remarks Congress made during the long and complicated history of the legislative process culminating in the passage of the new and fully revamped CEA. Rosenthal rejects the CFTC's conclusion. It is based on statutory provisions and informal remarks best described as ambiguous and truncated.

Numerous times within recent years this Court has dealt with the efforts of lower courts to imply a private right. In each instance in an effort to interpret Congressional intent, it has reviewed and analyzed the legislative record. From these analyses, it appears that certain elements or moments in the legislative process are more likely to indicate the Congressional intent and it is these crucial elements to which the Court returns again and again for guidance.

When analyzing the legislative history of any statute with a view to implication of a private right, this Court gives three key parts of the legislative process special attention. These are as follows: (1) efforts to enact provisions granting private rights; (2) the scheme of enforcement; and (3) the language of jurisdictional savings clauses. *See, Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, ... U.S. ....., 101 S. Ct. 2615 (1981). *Northwest Airlines, Inc. v. Transport Workers Union of America*, ... U.S. ....., 101 S. Ct. 1571 (1981); *California v. Sierra Club*, ... U.S. ....., 101 S. Ct. 1775 (1981); *Universities Research Assn. v. Contu*, ... U.S. ....., 101 S. Ct. 1451 (1981); *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11, 100 S. Ct. 242 (1979); *Touche Ross & Co. v. Redington*, 422 U.S. 560, 99 S. Ct. 2479 (1979); *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946 (1979). Rather than argue generally that Congress did not intend to imply a private right of action and then cast about in the record to support this conclusion, Rosenthal seeks instead only to draw the Court's attention to these three parts of the legislative process. Once the legislative history of these parts has been set forth, the conclusion is inescapable. Congress did not intend that a private right of action be implied under the CEA.

1. All Efforts To Include A Provision Creating A Private Right Of Action In The Federal Courts For Commodities Customers Were Defeated.

The 1974 Amendments to the CEA were originally introduced as H.R. 11955 in the House of Representatives. *Hearings on H.R. 11955 Before the House Comm. on Agriculture*, 93rd Cong., 2d Sess. 333-410 (1974). H.R. 11955 borrowed heavily from an earlier bill introduced in the House on October 30, 1973 by Representative Neal Smith, denominated H.R. 11195. Congressman Smith, in testimony before the House Agriculture Committee, noted the relationship between his bill and H.R. 11955:

> "The new bill which the committee introduced on December 11, H.R. 11955, is identical or very similar to H.R. 11195 which I had introduced on October 30, in a vast majority of its provisions." *Id.* at 2.

In his own bill, Congressman Smith had incorporated a provision to create an express private right to damages for persons injured by violations of the CEA. Section 17 of his bill (H.R. 11195) provided:

> "(3) Any person violating any provision of this Act or any regulation thereunder shall be liable to any person injured thereby for treble the amount of the damages sustained as a result of such violation."

The House Agriculture Committee, despite its heavy utilization of the Smith bill, did not expressly incorporate this provision—or *any* private remedy except arbitration or the administrative remedy of reparations—in the bill adopted by it.

In 1973, several bills to amend the CEA were introduced in the Senate, including bills by Senators McGovern (S. 2578) and Hart (S. 2837). Senator McGovern's bill contained the same provision as the Smith bill, allowing private actions for treble damages by persons injured under the CEA. *Hearings on S. 2485 et*

al. Before the Senate Comm. on Agriculture and Forestry, Part I, 93rd Cong., 2d Sess. 77.

Senator Hart offered a more complex provision in his bill (S. 2837), calling for the creation of a private right to single damages in most cases but for treble damages in cases of "willful violation":

CIVIL ACTION FOR DAMAGES

"Sec. 505(a) Any person who is injured by a violation of any provision of the Act or regulation or order issued thereunder by the Commission or any exchange, may bring a civil action for restitution in any district court having jurisdiction of the party who caused such injury. In any such action, an order of the Commission [finding violation] shall constitute prima facie evidence as to liability between the parties.

(b) Any person who is injured by a willful violation of any provision of this Act, or regulation or order issued thereunder may bring a civil action for three-fold the damages sustained by him, and the cost of suit including reasonable attorney's fees, in any district court having jurisdiction of the party who caused such injury." *Id.* at 118-19.

The Hart bill also dealt with the *prima facie* effect in civil cases of criminal convictions under the CEA and tolling of the statute of limitations for private actions while a Government proceeding is pending. The Senate Agriculture and Forestry Committee did not adopt any of these measures, nor did the full Senate or the Congress.

The original CEA contained no provision for private damage actions and, despite the efforts of Congressman Smith and Senators McGovern and Hart in 1974, the CEA remains devoid of such a provision. Instead, there exists only the right by injured persons to obtain single damages in a reparation proceeding administered by the CEA. The alternative remedy created by Congress is

arbitration conducted either by an exchange or a third party.

In contrast, Section 15 of the 1978 Amendments to the CEA, 92 Stat. 865, 872 (1978), expressly provides to state attorneys general the right to bring in Federal District Court injunctive or damage actions on behalf of citizens in their respective states. Section 15 further requires written notice of the action to the CFTC and gives the CFTC the right to intervene. This provision was enacted even though the court in *Kelly v. Carr*, 442 F. Supp. 346 (W.D. Mich., 1977), had already held that such an action existed, just as prior to the 1974 Amendments, the courts had held that an implied right of action existed under the CEA. The adoption of Section 15 by Congress evidences its intent that additional rights of action under the CEA would be established not by implication by the courts, but by explicit language in the CEA providing specific safeguards for CFTC involvement. This remedy created by Congress would only be used by public prosecutors. The fact that Congress has not adopted such a provision allowing private rights of action can only lead to the conclusion that Congress did not intend for such actions to be available.

2. The Remedial Scheme Is Comprehensive And Complete Supplanting Any Need To Supplement The CEA's Enforcement By An Implied Private Action.

Congress gave the CFTC a broad panoply of powers to enforce the CEA—much broader than that given to the SEC for example—including the power to assess civil monetary penalties, to declare market emergencies which could halt all trading in any commodity futures, and to seek injunctive relief in the federal courts. It is the comprehensiveness of the remedies provided under the CEA which most strongly militate against im-

plications. The comprehensiveness indicates the omission of private actions was deliberate, *Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11, 100 S. Ct. 242 (1979).

As part of the 1974 Amendments, Congress added Section 14 of the CEA (7 U.S.C. §18) which establishes trial-type reparation proceedings to be utilized by parties aggrieved by commodity transactions. There is no minimal jurisdictional amount.

Reparation proceedings were established to insure uniform interpretations and decisions at the initial adjudication by persons with experience and expertise in commodity transactions. Section 14(a) of the CEA (7 U.S.C. §18) provides for an aggrieved party to file a complaint with the CFTC, and the section further provides, *seriatim*, for investigations of the complaint [7 U.S.C. §18(a)-(d)], reparations awards for damages [7 U.S.C. §18(e)], judicial enforcement of reparations awards [7 U.S.C. §18(f)], Court of Appeals review and various penalties [7 U.S.C. §18(g), (h)], all of which have been further refined by CFTC regulation. See 17 C.F.R. §§12.1-12-102.

Because of its flexibility, a reparations proceeding is unquestionably less complex, less expensive and less time-consuming than a trial in federal district court. A trial-type hearing is conducted in plaintiff's home city before an Administrative Law Judge ("ALJ") in which each party is:

> ". . . entitled to due notice of hearings, the right to be represented by counsel, the right to cross-examine witnesses, present oral and documentary evidence, raise objections, make arguments and move for appropriate relief. 17 C.F.R. §12.79(b).

At the conclusion of the hearing, the ALJ renders an opinion. The CFTC may review the initial decision within 30 days upon application of either party or on its

own motion. If the CFTC determines not to review, the initial decision becomes the final order in the proceeding. *See* 17 C.F.R. §12.84(e). In practice, all initial decisions are examined to determine whether they involve generally significant policy issues that the CFTC may wish to address consistent with its broad responsibilities to regulate the conduct of industry professionals.

If a party against whom an award has been made does not pay the award, the plaintiff may obtain enforcement of that order in a federal district court. Subject to the respondent's right to appeal, the order awarding reparations is final and conclusive. Section 14(f), 7 U.S.C. §18(f). The district court's jurisdiction is limited solely to enforcement of the award. Judicial review of the merits of a reparation decision is available only in the Courts of Appeals.

Unless a reparations award is timely paid after an appeal has been completed or the time for appeal has passed, a respondent's registration is automatically suspended and it is prohibited from trading on all contract markets until it shows to the satisfaction of the Commission that the full award, plus interest, has been paid. Section 14(h) of the CEA, 7 U.S.C. §18(h).

The only involvement of state courts arises under Section 13a-2 which gives to the state attorney generals (not private parties) the right to restrain violations or enforce the provisions of the CEA if the interests of the state residents are being adversely affected. The CEA provides that the state may bring a suit in equity or an action at law on behalf of its residents to enjoin such act or practice . . . to obtain damages on behalf of their residents or to obtain such other relief as the court may deem appropriate.

The benefits to be derived from the reparations procedure would be largely defeated if plaintiffs were at liberty to ignore the reparations forum and bring damage actions in federal court. Since jurisdiction over commodities cases could be based on 28 U.S.C. §1337 as to which there is no minimum amount in controversy, *see Caulfield v. U.S. Department of Agriculture*, 293 F.2d 217, 222 n. 10 (5th Cir., 1961), even suits involving less than $5,000 could be brought in federal court with the right to a full judicial hearing if an implied cause of action were allowed. This would totally defeat the congressional intent to minimize the cost to the parties of prosecuting such claims.

Self-regulation by commodity exchanges and more recently industry futures associations is (and always has been) an important part of regulation of commodity transactions. In introducing the House bill which led to the 1974 Amendments to the CEA, Representative Poage made the following statement concerning the chilling effect that implied private rights of action were having on self-regulation:

> "Beginning approximately 50 years ago, the legal posture of exchange self-regulation began to change. Slowly the courts began to look upon exchange self-regulation as a guarantee to the public that its members would not violate its code of conduct. Additionally, when the Commodity Exchange Act was enacted, courts implied a private remedy for individual litigants in the Commodity Exchange Act. Thus, today the judgment of the board of directors of many of the exchanges in implementing decisions under self-regulatory functions is becoming increasingly a justiciable issue."
>
> "Attorneys for exchanges are now advising their clients to prune out rules or regulations where the enforcement capability is questionable. Instead of a

> situation where self-regulatory activities should be expanding for a given contract market, the exchange can now provide solid reasons for shrinking the protection given the customer and the public through self-regulation." Remarks of Representative Poage, 119 Cong. Rec. 41333 (1973).

Thus, as Representative Poage recognized, implication of a private right of action by this Court would seriously and negatively affect operations of the commodity exchanges which are at the very heart of the commodities industry.

Revisions to the reparations procedures in 1978 indicate Congress' continued commitment to having disputes between customers and brokers handled administratively rather than through private district court actions.

3. The Jurisdictional Savings Clause Neither Preserves Nor Creates A Private Right Of Action.

The jurisdictional savings clause of the CEA, Section 2(a)(1), 7 U.S.C. §2, provides that "nothing in this section shall supercede or limit the jurisdiction conferred on courts of the United States or any state." Those who would rely upon this provision to imply a private cause of action for damages also point to the remarks of Senator Talmadge to the effect that:

> The vesting in the Commission of the authority to have administrative law judges and apply a broad spectrum of civil and criminal penalties is likewise not intended to interfere with the courts in any way.

120 Cong. Rec. 30459 (September 9, 1974).

A close reading of the legislative history shows, however, that reliance on this statement by Senator Talmadge and on the jurisdictional savings provision is

entirely misplaced as a basis for implying a private cause of action under the CEA.

The full quotation from Senator Talmadge, which the CFTC brief fails to reproduce (CFTC Brief p. 11, n. 14), shows that the jurisdictional savings provision was designed to preserve the jurisdiction of the federal courts to hear appeals from decisions by the CFTC in reparation proceedings. As Senator Talmadge remarked.

> It is hoped that giving the Commission this authority will somehow lighten the burden upon the courts, *but the entire appeal process* and the right of *final determination* by the courts are expressly preserved.

120 Cong. Rec. 30459 (1979) (emphasis added). The CFTC's interpretation of Section 2(a)(1) fails when Senator Talmadge's remarks are put in context. As the Court stated in *Fischer v. Rosenthal & Company*, 481 F. Supp. 53 (N.D. Texas 1978):

> While Plaintiff construes these remarks to mean that Congress intended to create a private court remedy, it is more reasonable to conclude that the remarks signify that Congress intended the courts' role as one of appeal and final determination after the initial determination is made in the administrative reparation proceeding, as provided by 7 U.S.C. §18.

This interpretation is the most plausible one. The jurisdictional savings clause was necessary to preserve the role of the federal courts in the administration of the reparations procedure. This role had to be preserved not only for appellate review, but also for enforcement proceedings. As the Senate Report which accompanied the 1974 Amendments stated:

> If a reparation award is not paid, the person for whose benefit it is made, would have three years to file an action in court. He would have his choice of courts: The United States district court for the district of his residence or the district where respondent has its principle place of business, or any state court having general jurisdiction of the parties.

Senate Report No. 93-1131, reprinted in U.S. Code Cong. & Adm. News 5843, 5869 (1974). *See also* 7 U.S.C. §18 (expressly providing for enforcement of reparation awards in the district courts).

The CEA's legislative history indicates that the "savings clause" was also introduced to preserve the jurisdiction of the federal courts over pending investigation proceedings. As Chairman Poage observed:

> In addition, the conferees wish to make clear that nothing in the act would supercede or limit the jurisdiction presently conferred on courts of the United States or any State. This act is remedial legislation designed to correct certain abuses which Congress found to exist in areas that will now come within the jurisdiction of the CFTC. *Congress was aware that there have been ongoing efforts by various State and Federal regulators to prevent some of these abuses . . . We would expect that those investigations will continue and any proceedings resulting therefrom will not be affected by the passage of this act.*

120 Cong. Rec. H. 10,248 (daily ed. October 9, 1974) (remarks of Chairman Poage) (emphasis added).

In light of these alternative explanations for the passage of the jurisdictional savings provision, there is no basis for the conclusion that it was passed to preserve private damage actions which Congress never considered important enough to even mention in the Committee Reports.

The CFTC's conclusion that Section 2(a)(1) was designed to preserve private causes of action is not adequately supported by the legislative history. The Senate Committee on Agriculture and Forestry which proposed the amendment to Section 2(a)(1) heard almost 900 pages of testimony from 58 witnesses. *See Hearings on S. 2485, S. 2578, S. 2837 and H.R. 13113 Before the Senate Committee on Agriculture and Forestry*, 93rd Cong., 2d Sess. pts. 1-3 (1974). During the course of that extensive testimony, the CFTC is able to point to only two statements which even mention private suits for damages. Yet even these statements clearly refer to Section 505 of S. 2837, an express statutory provision allowing damage actions under the CEA which was not enacted by Congress. Implied rights of action were not even mentioned by these witnesses.

The CFTC also failed to mention Senator Curtis' remarks in their entirety:

> "Mr. President, I understand that *the intent of the bill is to grant exclusive jurisdiction over commodity futures trading to the new Commission, except to the extent the bill specifies that other Federal and State agencies and Federal and State courts are to retain jurisdiction.* However, as I understand it, it is also the intent of the bill that, even in the cases where the State agencies and State courts retain jurisdiction, the Federal substantive law embodied in the Commodity Exchange Act as amended by the bill would preempt the field completely, so that if any substantive State law were contrary to or inconsistent with Federal law, the Federal law would govern. (Emphasis added). 120 Cong. Rec. S. 16,133 (1974).

On the Senate floor, Senator Curtis successfully urged Congress to repeal a sentence in the existing CEA that was to preserve "any State law applicable to any transaction enumerated or described" in certain parts of the CEA. Senator Curtis pointed out that the sentence was

not compatible with the CFTC's new exclusive jurisdiction and the intended preemption of all state agencies. He indicated that after the 1974 Amendments only the substantive law in the CEA would govern. Thus there is no support in the legislative history for the CFTC's argument that Congress contemplated that the "state courts, pursuant to their general jurisdiction, would entertain commodity claims involving standards embodied in the Act" (CFTC Brief pp. 11-12). In fact, Congress was referring to those provisions of the CEA which gave jurisdiction to the state and federal courts. There is no general grant of jurisdiction in the CEA to the state and federal courts. Rather Congress fashioned particular remedies for public prosecutors in the state and federal courts and did not give any jurisdiction to matters concerning private parties other than for appeal. A simple reading of Senator Curtis' so-called "explanation" quickly shows that it is nothing more than a restatement of the language of the jurisdictional savings clause itself. It casts absolutely no light on the reasons for its adoption.

The Commission's interpretation of the jurisdictional savings clause completely ignores the other possible reasons for the adoption of Section 2(a)(1) suggested by the statements of Senator Talmadge and Senator Curtis discussed above. Ignoring alternative explanations for changes in a legislative bill, however, tends to undermine the reliability of the conclusions that may be drawn from such an analysis. As this Court stated in *Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947) in rejecting the Government's analysis of the legislative history of a statute in circumstances remarkably similar to this case:

> These reasons . . . are not weakened by the Government's strained and unconvincing citation of the Act's legislative history.

> That argument is grounded in conclusions drawn from changes made without explanation in committee with respect to various provisions [of the Act]. Apart from the inconclusive character of the history, the Government's contention assumes that the only alternatives presented by the final form of the bill were indefinite duration for the incidents of the employment named and none at all. *This ignores the other possibilities considered in this opinion. . . .* Moreover, as has been noted, the most important committee changes relied upon were made without explanation. *The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers.*

(Emphasis added).

The CFTC's argument in this case as to the significance of Section 2(a)(1) is also premised on "mute intermediate legislative maneuvers." *Id.* Likewise, in this case the CFTC assumes that the only explanation for the adoption of Section 2(a)(1) is the one which supports its desire for a private cause of action even though it must ignore all other explanations. Accordingly, there is no basis for the inference that Section 2(a)(1) evidences a Congressional intent to preserve an implied cause of action for damages under the Act.

B. Congress Never Intended To Adopt By Reenactment The Implication Of A Private Right Of Action Under The CEA.

Recognizing the practice prior to 1974 of implying a private right of action under the CEA, the CFTC contends that the 1974 Amendments to the CEA incorporate and preserve this judicial interpretation of the statute. The CFTC's argument, based on the doctrine of reenactment, is misplaced.

First Congress never was made aware nor affirmatively indicated its intent to adopt by reenactment an

implied private right of action under the CEA as amended in 1974. Second, the statutory language of the CEA, particularly the remedial provisions, was not reenacted "without substantial change," but was significantly altered in 1974. *See* 7 U.S.C. §1, *et seq.* Third, the reenactment doctrine is generally limited to decisions of courts of last resort. However, this Court had never considered the implied cause of action issued under the CEA prior to the complete revision in 1974. Fourth, the reenactment doctrine requires a long line of uniform judicial holdings. Most of the decisions cited by the Currans and the CFTC to establish the judicial acceptance of an implied cause of action under the CEA do not stand for the proposition for which they are cited. Finally, the reenactment doctrine is merely an aid to statutory construction, and may be disregarded in appropriate circumstances.

1. Congress Never Affirmatively Indicated Any Intention To Apply The Doctrine Of Reenactment To Preserve The Implication Of Private Actions.

This Court has ruled that in order to apply the "doctrine of reenactment" Congress must not only have been made aware of prior court decisions but must also have given some "affirmative indication" of such intent. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431-32, 75 S. Ct. 473 (1955); *Accord, NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 350-52, 73 S. Ct. 287 (1953); *Interstate Drop Forge Co. v. Commissioner*, 326 F.2d 743, 746 (7th Cir., 1964); *International Brotherhood of Operative Potters v. NLRB*, 320 F.2d 757, 760 (D.C. Cir., 1963). By no stretch of the legislative record can it be seriously argued that Congress generally knew of federal court decisions which implied private actions. Furthermore, there is absolutely no place in the legislative history where any mention of the reenactment doctrine by anyone is made.

The doctrine of reenactment is applicable only when the legislative record evidences general Congressional awareness of the prior judicial or administrative decisions. In *SEC v. Sloan*, 436 U.S. 103, 120-121 (1978), the SEC argued that the 1964 reenactment of the summary suspension power contained in the Securities Exchange Act of 1934 without disapproval of the Commission's interpretation of that power constituted Congressional approval of the Commission's construction of the statute. The Commission pointed out that its interpretation of the statute had been made known to Congress in committee hearings, and one Congressional committee actually recognized and approved of the SEC's prior practice under the statute. This Court nonetheless found this evidence of Congressional awareness insufficient and therefore concluded that application of the reenactment doctrine would be appropriate. In so holding, the Court stated:

> Although the section in question was reenacted in 1964, and while it appears that the Committee Report did recognize and approved of the Commission's practice, this is scarcely the sort of congressional approval referred to in *Zuber v. Allen*, 396 U.S. 168, 192 (1969).
>
> We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this.

SEC v. Sloan, *supra* at 121 (1978).

The legislative history in the instant case is similarly inconclusive concerning the general level of Congressional awareness of lower court decisions on the implied cause of action issue. In support of its position, the

CFTC refers to a letter from Sheldon Berens, an executive of a grain company, and to a statement made on the floor of the House by Rep. Poage (CFTC Brief pp. 6-7, 16). These scattered bits of evidence are wholly inconclusive proof of general congressional awareness of the availability of a private cause of action. *See March v. United States*, 506 F.2d 1306, 1314, ns. 30 and 31 (D.C. Cir., 1974).

An examination of the Committee hearings shows that neither the letter from Mr. Berens (addressed to a single Congressman) nor the remarks of Representative Poage bear any reference to judicial decisions approving of implied causes of action under the statute. Such passing references to statements in the legislative history of a statute are of little, if any, value. *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 31 n. 20 (1977).

Assuming that Rep. Poage's colleagues in the House were able to catch his fleeting reference to the fact that some lower courts had judicially implied a private right of action, there is no indication that the members of the Senate were similarly informed. Perhaps most significantly, this notion of the private cause of action never found its way into any of the Committee Reports, nor did any Committee express its views on the issue, as occurred in the *Sloan* case. Under the circumstances, there is no basis for assuming general congressional awareness of judicial decisions "based only upon a few isolated statements in the thousands of pages of legislative documents." *SEC v. Sloan*, *supra* at 121.

Not only was Congress not aware of any lower court practice implying private actions but nowhere in the long detailed legislative history examining every detail of the 1974 and 1978 Amendments was there any reference by any legislator or any witness urging a reenactment theory or even mentioning the doctrine of

reenactment. Without an "affirmative indication," the CFTC's arguments based on the doctrine of reenactment must fall.

2. Since The 1974 Amendments Substantially Changed The CEA, The Reenactment Doctrine Does Not Govern.

The reenactment doctrine applies only when a statute is reenacted without substantial change. *United States v. Douglas Aircraft Co.*, 510 F.2d 1382 at 1392 (CCPA, 1975). There is no question that the 1974 Amendments to the CEA, the Commodity Futures Trading Commission Act of 1974 ("CFTCA") was a major revision of the CEA.

Prior to 1974 the CEA had been concerned exclusively with agricultural commodities and the regulatory agency was a part of the United States Department of Agricultural. The growth of the commodities industry, however, outstripped the expansion of the regulatory agency. For instance, agricultural futures other than trading in grains and meats was non-regulated futures trading.[1]

In 1974 Congress again amended the CEA and invested it with jurisdiction over *all* commodities—including coffee, sugar, silver, etc. In order to improve the regulation of commodity transactions and to achieve uniformity and consistency in such regulation, Congress created an independent federal regulatory agency, the

[1] Prior to the CFTC's creation on April 21, 1975, trading in coffee, gold, sugar, orange juice, and all commodity options was "unregulated". That is to say no regulatory agency had exclusive jurisdiction over the trading in these commodities so responsibility was shared by the Department of Agriculture, Bureau of Mines and the Securities Exchange Commission. This patchwork regulatory scheme was corrected by the 1974 amendments to the CEA which gave the CFTC exclusive jurisdiction over these areas of commodity trading.

CFTC, and invested it with exclusive jurisdiction over all commodity futures and options transactions.

Among other things, the 1974 Amendments provided a "comprehensive structure to oversee the volatile and esoteric futures trading complex." H.R. Rep. N. 975, 93rd Cong., 2d Sess. 1 (1974). As part of this comprehensive regulatory structure Congress provided for the CFTC, a new independent federal regulatory commission. Also included in the 1974 Amendments, Congress created reparations as a private right of action for individual speculators who suffer losses from their dealings with commodity professionals resulting from a violation of the CEA. These reparations proceedings are intended to resolve broker-customer disputes and to insure uniform interpretations of the CEA's provisions affecting this complex industry.

As noted in the Senate Report which accompanied the 1978 Amendments to the CEA: "The Commodity Futures Trading Commission Act of 1974 constituted a *significant and substantial revision* of the Commodity Exchange Act." S. Rep. No. 95-850, 95th Cong., 2d Sess. 12 (1978), *reprinted in* (1978) U.S. Code Cong. & Admin. News, p. 2098 (emphasis added). Accordingly, on this ground alone the presumption that Congress intended to ratify pre-existing judicial decisions is inapplicable herein. As the district court stated in *Stone v. Saxon*, 485 F. Supp. 1210 (N.D. Ill. 1979):

> "We are not at all sure that . . . awareness at the time of reenactment would be tantamount to amendment of what we conceive to be the rather plain meaning of the (statutory) language. . ." *Securities and Exchange Commission v. Sloan*, 98 U.S. 1702, 1713 (1978). This *caveat* has added meaning in a case such as this, where the 1974 amendments were a substantial modification rather

than mere reenactment, of the pre-existing statutory scheme.

Id. at 1214. *See Rivers v. Rosenthal & Company,* 634 F.2d at 781 (5th Cir., 1980).

In *Rivers* the Fifth Circuit carefully examined the entire legislative history of the CEA. The *Rivers* court found "the CFTCA actually constituted 'the first *complete overhaul* of the Commodity Exchange Act since its inception.'" *Id.* at 781, quoting H.R. Rep. No. 975, 93rd Cong., 2d Sess. 1. The CFTCA for the first time expressly provided alternative forums for persons seeking redress from those responsible. This involved the arbitration provisions at 7 U.S.C. §7a(11) and the reparations provisions of 7 U.S.C. §18.

No other remedies or forums were afforded by Congress to public speculators to hear alleged violations of the CEA.

3. Congress Should Only Be Presumed To Adopt By Reenactment The Decisions Of Courts Of Last Resort.

It is recognized that the presumption that Congress adopts pre-existing judicial interpretations when it reenacts a statute without substantial change is generally stated in terms of interpretations by courts of last resort. *See United States v. Douglas Aircraft Co., supra* at 1397 n. 8; *Waterman-Bic Pen Corp. v. United States,* 223 F. Supp. 35, 44 (S.D.N.Y. 1963), *aff'd.,* 332 F.2d 711 (2d Cir., 1964). Since all of the cases cited by the CFTC dealing with the implied cause of action were decisions of inferior federal courts, this Court is free to disregard that presumption in construing the statute.

4. Prior Judicial Decisions Do Not Support Application Of The Reenactment Doctrine.

Application of the reenactment doctrine generally requires a long and well-settled prior judicial construction of a statute. *Shapiro v. United States*, 335 U.S. 1, 16 (1948); *Francis v. Southern Pacific Co.*, 333 U.S. 445, 450 (1948). One decision construing an act does not approach the dignity of a well-settled interpretation. *United States v. Raynor*, 302 U.S. 540, 552 (1938). Even several cases if they employ only a cursory analysis are insufficient. *See T.I.M.E. v. United States*, 359 U.S. 464, 477 (1959). Furthermore, application of the reenactment doctrine may not be based on cases whose construction of the statute is at variance with the claimed interpretation, relates to a different provision of the statute or is not necessary to the holding of the case. *See New York v. Saper*, 336 U.S. 328, 335-40 (1948).

The cases cited by the CFTC to demonstrate the prior judicial construction of the CEA do not approach the dignity of a well-settled interpretation (CFTC Brief at 5-6, n. 5). Two cases cited, *Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96 (7th Cir., 1977) and *Case & Co., Inc. v. Board of Trade*, 523 F.2d 355 (7th Cir. 1975), are clearly irrelevant to the reenactment doctrine insofar as it relates to the 1974 Amendments since Congress could not have been aware of decisions in 1974 that had not yet been decided. *See, e.g., Panama R.R. Co. v. Rock*, 266 U.S. 209, 212-13 (1924). Likewise inappropriate is *Deaktor v. L. D. Schreiber & Co.*, 479 F.2d 529 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973), since it was not only reversed on appeal, but involved interpretations of the statute prior to the 1974 Amendments by the CFTCA. As the Supreme Court's decisions clearly show, a willingness to imply a cause of action under one section of a statute does not justify the implication of a cause of action

under another section. *See Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11 (1979) (cause of action implied under §215 of the Investment Advisers Act, but not under Section 206); *Touche Ross & Co. v. Redington*, 422 U.S. 560 (1979) [cause of action implied under Section 14(a) and 10b of the Securities Exchange Act of 1934, but not under Section 17(a)]. *See also Stone v. Saxon, supra.*

In *Booth v. Peavy Company Commodity Services*, 430 F.2d 132 (8th Cir., 1970), the Court's statement regarding a private remedy under the CEA was pure *dicta* wholly unnecessary to the decision in the case. Not only did the appellate court affirm a directed verdict for the defendant since there was no evidence of churning, but the court stated that "a private remedy for churning a commodity account is permitted by *either* §6d of the Commodity Exchange Act . . . *or* the applicable portions of the Securities Act of 1933 . . . and the Securities Exchange Act of 1934." *Id.* at 133 (emphasis added). In short, the Court never took a firm position on the private cause of action question and engaged in absolutely no analysis.

Petitioner and *amici* also cite the decision in *Gould v. Barnes Brokerage Co.*, 345 F. Supp. 294 (N.D. Tex. 1972), for the proposition that a private cause of action exists under the Commodity Exchange Act. *Gould* stands for no such proposition. Rather, the Court there denied the defendant's motion to dismiss for lack of jurisdiction because the facts stated in the Complaint appeared to state a claim for relief under the federal securities laws. Furthermore, the Court expressly noted the dubious precedential value of the *Booth v. Peavy* case. *Id.* at 295, n. 6.

Johnson v. Arthur Espey, Shearson, Hammill & Co., 341 F. Supp. 767 (S.D.N.Y. 1972) is also inapplicable

since the Court dismissed the case against the plaintiff for failure to comply with Rule 23.1, of the Federal Rules of Civil Procedure. Any statement in the case concerning the CEA is purely *dicta*.

The remaining cases, *Arnold v. Bache & Co., Inc.*, 377 F. Supp. 61 (M.D. Pa. 1972); *McCurnin v. Kohlmeyer & Co.*, 340 F. Supp. 1338 (E.D. La. 1972); and *Goodman v. H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967), do stand for the proposition for which they are cited that an implied cause of action as it existed under Section 4b of the CEA prior to 1974. Their analysis is cursory and standing alone they cannot support application of the reenactment doctrine.[2] *See T.I.M.E. v. United States, supra.*

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[2] It should be pointed out that the existence of lower court decisions implying a private cause of action under the Investment Advisers Act was insufficient to alter the decision in *Transamerica Mortgage Advisers, Inc. v. Lewis, supra.* The SEC had pointed out in its brief to the Supreme Court an impressive list of lower court decisions implying a private cause of action under §206 of the Act. (Brief for the Securities Exchange Commission as Amicus Curiae, at 5 n. 1.) Nonetheless, this Court found that no implied cause of action existed under §206.

This statement in the SEC's brief listing the lower court decisions under the Investment Advisers Act reads as follows:

> A number of district courts previously had found that private plaintiffs may sue to enforce Section 206 of the Investment Advisers Act. See *Sullivan v. Chase Investment Services of Boston, Inc.*, 434 F. Supp. 171, 179 (N.D. Cal. 1977); *Fund of Funds, Ltd. v. Vesco*, (1976-1977) CCH Fed. Sec. L. Rep. ¶95,644 at 90, 197-90, 198 (S.D.N.Y. 1976); *Angelakis v. Churchill Management Corp.*, (1975-1976) CCH Fed. Sec. L. Rep. ¶95,285 at 98, 463-98, 464 (N.D. Cal. 1975); *Jones v. Equitable Life Assurance Society*, 409 F. Supp. 370, 373 (S.D.N.Y. 1975); *Bolger v. Laventhol, Kekstein, Horwarth & Horwarth*, 381 F. Supp. 260, 265, 268 (S.D.N.Y. 1974). See also *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732-734 (3rd Cir., 1970); *Gross v. Diversified Mortgage Investors*, 431 F. Supp. 1080,

(Footnote continued on following page)

II.

APPLICATION OF THE *CORT v. ASH* TEST COMPELS THE CONCLUSION THAT NO PRIVATE RIGHT OF ACTION EXISTS UNDER THE CEA.

Rosenthal chooses not to argue the application of the *Cort v. Ash* test to determine whether a private cause of action may be implied under the CEA. Instead it defers to the many discussions on this question in the many briefs filed with the Court. Concerning the first point of the *Cort v. Ash* test, Rosenthal makes one reference to the concurrence of Justice Stevens in *Middlesex County Sewerage Authority v. National Sea Clammers, supra.* Justice Stevens agreed with the majority that no private right of action could be implied under the Federal Water Pollution Control Act ("FWPCA") and the Marine Protectors, Research and Sanctuaries Act of 1972 ("MPRSA"). His analysis, however, was not based simply on Congressional intent alone but included consideration of the breadth of the class benefited. Justice Stevens concluded that the FWPCA and MPRSA were not written to benefit a special class. A comparison of the language of the CEA with pertinent sections of the FWPCA and the MPRSA reveals that the CEA is at least as broadly written. The CEA is clearly "enacted for the protection of the marketplace as well as the

---

[2] *continued*

1094-1095 (S.D.N.Y. 1977); *Fox v. Prudent Resources Trust*, 382 F. Supp. 81, 90-92 (E.D. Pa. 1974); *Young v. Seaboard Corp.*, 360 F. Supp. 490, 497 (D. Utah 1973); *Courtland v. Walston & Co., Inc.*, 340 F. Supp. 1079, 1082-1085 (S.D.N.Y. 1972). Two district courts have held that private remedies do not exist. See *Greenspan v. Del Toro*, (1975-1976) CCH Fed. Sec. L. Rep. ¶95,488 (S.D. Fla. 1974); *Gammage v. Roberts, Scott & Co., Inc.*, (1974-1975) CCH Fed. Sec. L. Rep. ¶94,761 (S.D. Cal. 1974). Those two decisions are of little effect because they are from circuits (the Fifth and Ninth) in which appellant opinions thereafter allowed private actions.

general public" and for this reason alone does not lend itself to private implication. Section 3 of the CEA, 7 U.S.C. §5.

CONCLUSION

For the reasons stated above, the Sixth Circuit Court of Appeals erred in implying a private right of action under the CEA. Rosenthal respectfully submits that the Court should reverse the Sixth Circuit's decision and that the Currans should be required to pursue this action in a reparation proceeding before the CFTC.

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No. 80-203

IN THE

Supreme Court of the United States

October Term, 1981

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Petitioner,

v.

J.J. CURRAN and JACQUELYN L. CURRAN
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION BY SAMUEL FRIEDMAN FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Samuel Friedman hereby respectfully moves pursuant to Supreme Court Rule 36.3 for leave to file a brief *amicus curiae* in support of respondents. Consent of petitioner and of respondents to file this brief was requested but refused by petitioner.

Samuel Friedman is plaintiff in *Samuel Friedman* v. *Bache Halsey Stuart Shields, Inc., Bache Group, Inc., Board of Trade of the City of Chicago, Nelson Bunker*

Hunt, William Herbert Hunt and Lamar Hunt, No. 80 C 1111, presently pending in the United States District Court for the Northern District of Illinois. Friedman's suit alleges that his commodity futures broker and its affiliates (the "Bache defendants"), acting in concert with the Hunt defendants and with the acquiescence of the Chicago Board of Trade, participated in a mammoth manipulation of the market price of silver futures contracts, thus violating Section 9(b) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 13(b). Against the background of this mammoth conspiracy, moreover, the Bache defendants allegedly induced Friedman to make substantial investments, resulting in losses of approximately $600,000, in short sales of silver futures. The inducements made by Bache included false and fraudulent representations and failure to disclose material facts concerning the illegal conspiracy between Bache and the Hunts to manipulate silver futures prices. Among these many undisclosed facts was a substantial, unreported equity position* of the Hunts in Bache. All of these fraudulent inducements make out claims against Bache for violations of Section 4b of the CEA, 7 U.S.C. § 6b.**

Only days after Friedman brought this action in the Northern District of Illinois, Bache brought a contractual action against him in state court in Florida. *Bache* v. *Friedman*, 80-4340, Circuit Court for the Eleventh Judicial District. Thus, Friedman is both a defendant sued in con-

* Itself in excess of 5% and thus in violation of the Securities Exchange Act registration requirements.

** Friedman's antitrust claims against all defendants have been dismissed, albeit Judge McMillen is currently entertaining a motion to reconsider or grant leave to appeal from such dismissal.

tract and a plaintiff suing under the CEA. He alleges wrongs at the hands of both registrants and non-registrants, acting in concert and individually, and requires proper discovery against both in order to establish his antifraud claim.

Friedman here supports respondents' position that 7 U.S.C. § 6b provides an implied private right of action against commodity futures brokers by their defrauded customers. But Friedman's situation is much more enlightening than respondents' because, if respondents should fail to uphold the private right of action under 7 U.S.C. § 6b here, Friedman and those investors similarly situated would find themselves in a uniquely inequitable position in two respects.

First, brokers guilty of fraud would be able to sue their customers in contract for any account deficit, in state or federal court (in diversity), while forcing the beleagured investor to take his CEA counterclaims into a reparations proceeding under 7 U.S.C. § 18, the courts having been ousted of jurisdiction over the CEA claims. See, *e.g.*, *Paine Webber Jackson & Curtis, Inc.* v. *Rosciszewski*, [Current] Comm. Fut. L. Rptr. [CCH] ¶ 21,175 (S.D. Cal., April 16, 1981), allowing such a broker to proceed with its suit on an account, notwithstanding the customer's posited inability to bring CEA counterclaims. Meanwhile, the investor would himself be able to obtain no relief in reparations until he got to the head of an already extremely long line of backlogged reparations claimants. See CFTC Annual Report for 1979, p. 29.

Second, Friedman and those similarly situated could not get all necessary defendants before the same forum and

could not obtain proper discovery, because reparations is available only against registrants, and Friedman's antitrust claim and his other claims involve both registrants (brokerages) and non-registrants (exchanges and the Hunt defendants). Indeed, should this Court hold that no provision of the CEA offers an implied private right of action, Friedman might never obtain any relief at all against the non-registrants. The Hunt silver debacle might then become the forerunner of similar, wide-ranging commodity manipulations which would flourish in an environment where victimized investors had no effective, comprehensive legal remedy.

Finally, in Friedman's situation the position taken by petitioner paints Congress as having irrationally intended not only these two inequitable results, but also the additional absurdity of something precisely contrary to Congress' purpose. While none dispute that Congress intended by the 1974 Amendments to the CEA to *strengthen* deterrence against the many evils in the "badlands of the commodities markets," *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417, 435 (N.D. Cal. 1968), peitioner's position paints Congress as having intended to (i) strip investors of their right to sue, (ii) make reparations proceedings under 7 U.S.C. § 18 the exclusive remedy, and (iii) subject investors like Friedman to suit by their brokers without any right to make CEA counterclaims. Heightening the absurdity of petitioner's view is that, Congress having supposedly intended to eliminate one deterrent (private suit), it then intended to "strengthen" deterrence by allocating to the CFTC woefully insufficient resources to handle even the limited number of reparations proceedings currently being brought by defrauded investors. See CFTC Annaul Report for 1979, p. 29.

Accordingly, Friedman has special incentives to uphold the implied private right of action under 7 U.S.C. § 6b, and to preserve the federal courts as a forum for comprehensive relief of CEA claims. Should petitioner prevail here, investors like Friedman would be prejudiced by inappropriate discovery and extremely slow, substantively inadequate relief against registrant wrongdoers, and, should the Court hold against respondent in *New York Mercantile Exchange* v. *Leist* (80-757) as well, no relief at all under the CEA against non-registrants.

Friedman therefore requests the Court's leave to file the attached brief *amicus curiae*, in support of respondents.

Dated: August 29, 1981

Respectfully submitted,

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No. 80-203

IN THE

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MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Petitioner,

v.

J.J. CURRAN and JACQUELYN L. CURRAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR SAMUEL FRIEDMAN AS *AMICUS CURIAE*

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Question Presented

Whether the comprehensive amendment in 1974 of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, (the "CEA") extinguished the implied private civil action that had previously been recognized to exist in favor of customers against their brokers who commit fraud in violation of Section 4b of the CEA, 7 U.S.C. § 6b?

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Interest of the *Amicus Curiae*

Amicus Samuel Friedman is plaintiff in *Samuel Friedman* v. *Bache Halsey Stuart Shields, Inc., Bache Group, Inc., Board of Trade of the City of Chicago, Nelson Bunker Hunt, William Herbert Hunt and Lamar Hunt*, No. 80 C 1111, presently pending in the United States District Court for the Northern District of Illinois. Friedman's suit alleges that his commodity futures broker and its affiliates (the "Bache defendants"), acting in concert with the Hunt defendants and with the knowing or negligent acquiescence of the Chicago Board of Trade, participated in a mammoth manipulation of the market price of silver futures contracts, thus violating Section 9(b) of the Commodity Exchange Act ("CEA"), 7 U.S.C. § 13(b).* Against the baeground of this mammoth conspiracy, moreover, the Bache defendants allegedly induced Friedman to

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* It is a matter of record that the Hunts (long-experienced in manipulation of the various commodities, see *Commodity Futures Trading Commission* v. *Hunt*, 591 F.2d 1211 (7th Cir. 1979); "Hunts Paying Civil Penalties on Soybeans," in *The New York Times*, July 22, 1981, p. D-14) formed an off-shore joint partnership venture with several Arabs to accumulate all-time record long futures positions in silver futures contracts, financed through and otherwise assisted by Bache, while the Hunts were simultaneously saving Bache's management from a threatened takeover by Canadians. See, "Bache-Hunt Tie Raises Questions/Effect on other Clients is Cited," *The New York Times*, April 2, 1980, pp. D-1, D-11; "10 Banks Lent Bache $233 Million/Funds Reported To Be For Hunts," *The New York Times*, May 2, 1980, pp. D-1, D-4; Canadian Concern Looks With Interest at Bache," *The New York Times*, January 14, 1980, pp. D-1, D-2; "Bunker Hunt Lists New Data On Purchase Of Bache Stock That May Be Damaging," *Wall Street Journal*, August 13, 1980, p. 7.

We believe the egregious unlawfulness here exemplifies the "badlands of the commodities markets." *Hecht* v. *Harris, Upham & Co.*, 283 F. Supp. 417, 435 (N.D. Cal. 1968). "From the beginning, the inherent speculativeness of commodity trading and the absence of government regulation spawned a breeding ground for unscrupulous

(footnote continued on next page)

make substantial investments, resulting in losses of approximately $600,000, in short sales of silver futures. The inducements made by Bache included false and fraudulent representations and failure to disclose material facts concerning the illegal conspiracy between Bache and the Hunts to manipulate silver futures prices.

Friedman is concerned that if this Court were to rule that there is no implied private right of action under 7 U.S.C. § 6b, Friedman would be compelled to resist contract claims by his broker in Florida state court, now pending in *Bache* v. *Friedman*, 80-4340, Circuit Court for the Eleventh Judicial District of Florida, without the opportunity to present counterclaims under 7 U.S.C. § 6b relating to the same transactions, in Florida or in any other court.*

Furthermore, should 7 U.S.C. § 6b not provide a private right of action and Friedman be forced to resort to reparations, then the Hunts and other non-registrants, who are statutorily not amenable to reparations proceedings, could not be brought before the same forum as the registrant defendants, nor could proper discovery regarding the CEA antifraud claim be had.

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tactics, manipulation, and irresponsible trading." *Precious Metals Associates* v. *CFTC*, 620 F.2d 900, 905 (1st Cir. 1980).

Indeed, we believe that the prevalence of these evils and the ease of with which futures markets were perverted were precisely the factors which prompted Congress to amend comprehensively the CEA in 1974 in order to "strengthen deterrence." See generally the discussion of legislative history in *Leist* v. *Simplot*, 638 F.2d 283, 296, 305-07, 322-23 (2d Cir. 1980). These points (which, we believe, underpin the strongest arguments supporting implication of private actions under the CEA here) have already been made in the Brief for Respondents in *New York Mercantile Exchange* v. *Leist*, No. 80-757, *passim*, and will not be repeated herein.

* See *Paine Webber Jackson & Curtis, Inc.* v. *Rosciszewski*, [Current] Comm. Fut. L. Rptr. [CCH] ¶ 21,175 (S.D. Cal., April 16, 1981).

Finally, should this Court hold that *no* provision of the CEA provides a private right of action, Friedman might have no single forum before which to bring all necessary defendants in his attempt to gain redress for his losses in the massive Hunt silver market manipulation.

Summary of Argument

Congress never intended the creation of the CFTC in 1974 to extinguish other then-existing modes of regulating commodity futures transactions. Primary among those other methods of controlling commodity futures abuses was the then universally recognized implied private right of action under the CEA. Congress reaffirmed these other modes again in 1978 when it reacted to state hesitancy to help enforce the CEA as *parens patria* by authorizing the states to sue for money damages as the collective representative of individual private claimants. Express language in the reparations (7 U.S.C. § 18) and arbitration (7 U.S.C. § 7a(11)) provisions of the CEA specifies that they are optional, and hence alternative procedures to the implied private right of action under the CEA. Congress could not have intended the reparations procedure to oust courts of comprehensive jurisdiction over CEA claims, since such a regime would enable brokers to sue defrauded investors in contract but bar investors from making CEA counterclaims. Furthermore, victims of broad commodity manipulations would find themselves unable to bring all wrongdoers before any single forum, should the Court hold that Congress intended to vest in the CFTC exclusive jurisdiction, in reparations proceedings, over those among the wrongdoers who happen to be registrants under the CEA.

ARGUMENT

In *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), this Court spelled out four criteria by which courts could assess whether an implied cause of action should be read into any given federal statute.

In *Davis* v. *Passman*, 442 U.S. 228 (1979), this Court stated explicitly that the *Cort* approach merely provides criteria through which Congressional intent can be discerned. In recent cases, this Court has exhibited an increasing emphasis on the elements of the *Cort* analysis which focus on the relevant statutory scheme, the statutory structure, and statutory language. *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979).

Whatever analysis is employed, be it *Transamerica* (see Part I herein) or *Cort* (see Part II herein)—it is clear that Congress intended to continue the private right of action under 7 U.S.C. § 6b.

I.

The Regulatory Scheme, the Structure, and the Express Provisions of the CEA All Assume and Hence Indicate the Existence of an Implied Private Right of Action.

A. The Explicit Regulatory Scheme of the CEA Leaves Ample Room For, and at Points Relies on, an Implicit Private Right of Action.

Petitioner seeks, by minutely describing the "framework of the uniform, cohesive and expert CFTC administration of commodity futures trading that is the cornerstone of the 1974 Amendments," Brief of Petitioner at 12,

to portray the express scheme of CFTC regulation under the CEA as occupying the whole field of commodity futures trading. Congress, the CFTC, and the courts do not agree with petitioner.

Congress does not agree with petitioner. Far from viewing commodity futures trading as the exclusive preserve of the CFTC, the Congress in 1978 blithely empowered state attorneys general to sue for injunctive relief and *monetary damages* on behalf of residents of their respective states, Section 6d of the CEA, 7 U.S.C. § 13a-2, while the legislative history reflects no indication that Congress viewed such damage suits as a seachange in the 1974 scheme or an unprecedented incursion into the CFTC bailiwick. To the contrary, the legislative history of this 1978 *parens patriae* provision shows Congress understood that it was codifying existing principles. Able counsel for petitioner, ignoring the obvious anomaly in his argument that Congress authorized the states to sue collectively based on rights that purportedly do not exist individually, seeks to turn the evidence on its head by arguing that the codification of *parens patriae* suggests the disavowal of the implied private right of action, because that implied right has *ipso facto* not been likewise codified. Yet the extensive discussion of the 1978 Amendments *infra* pages 19 to 21 demonstrates beyond peradventure that Congress enacted *parens patriae* because the *implied parens patriae* doctrine had developed technical and procedural problems which had discouraged its utilization by the states.

The CFTC also does not agree with petitioner, since it consistently takes the position that private damage actions will supplement, rather than confuse, the regulatory

scheme. See, *e.g.*, Brief for the CFTC as Amicus Curiae, *New York Mercantile Exchange* v. *Leist* and related cases Nos. 80-757, 80-895 and 80-936, Supreme Ct. of U.S.

Nor do the federal courts agree that CFTC regulation occupies the whole field of commodity futures trading. Prior to the 1974 Amendments to the CEA, it was "undisputed that a private cause of action may be maintained under the Commodity Exchange Act." *Case & Co.* v. *Board of Trade*, 523 F.2d 355, 360 (7th Cir. 1975). Although the uniformity of these court decisions under the CEA has weakened since 1974, a strong preponderance of recent cases still upholds the private right of action under the CEA.

As the CFTC has itself recognized, the coherence of any regulatory scheme depends upon neither (1) the identity of the party plaintiff nor (2) the forum in which adjudication takes place, but rather upon the body of law being applied. See CFTC Memorandum to all state securities administrators (October 8, 1976), reprinted at [CCH] Comm. Fut. L. Rptr. ¶ 20,218 [1975-77 Transfer Binder], (hereinafter "CFTC Memorandum") supporting state *parens patria* actions under the CEA (*prior* to their express statutory authorization in 1978, CEA § 6d, 7 U.S.C. § 13-a2) on the basis that "since the new *federal* law, there will be no question of [federal] preemption of state action [in bringing injunctive suits] . . ." at p. 21,187 (emphasis in original).

It is a mistake to assume, as petitioner does here, that the strengthening of administrative powers and the creation of administrative remedies carved out at an air-tight regulatory compartment for the CFTC. Just as Congress in

1978 expressly authorized the states to sue under the CEA as *parens patria* (7 U.S.C. § 13a-2), and implicitly authorized (in our view and the view of many courts) injured private citizens to seek relief in court under the CEA, so has there been room for law enforcement officials to prosecute mail fraud in commodity futures transactions (*United States* v. *Shareef*, 634 F.2d 679 (2d Cir. 1980); *United States* v. *Brien*, 617 F.2d 299, 309-11 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980) (both applying 18 U.S.C. § 1341 to commodities futures transactions)), and for private persons to sue for damages under the antitrust laws (*Pollock* v. *Citrus Associates*, 512 F. Supp. 711 (S.D.N.Y. 1981)).

B. The Structure of the CEA Requires, and Hence Shows Congressional Intent to Create and Preserve, an Implied Private Right of Action.

Apart from the fact that the entire spirit and framework of the CEA exhibits no effort on the part of Congress to supplant private (or state or non-CFTC agency) enforcement of the CEA with a solely CFTC-administered regime, the specific structural components of the CEA require a conclusion that Congress built the CEA with an implied private right of action in mind.

The reparations provisions of Section 14 of the CEA, 7 U.S.C. § 18, would degenerate into a nightmare of procedural fragmentation, should this Court rule that the CEA permits no private right of action. Congress could not have intended such a result, but instead must have intended

to create an *expedited, limited* reparations procedure* to be invoked against *specified* classes of *commodities professionals* at the *option* of the investor.

As petitioner would have it, an investor standing in the shoes of the *amicus*, who presses claims against registrants (brokerage houses under 7 U.S.C. § 6b for fraud and 7 U.S.C. § 13(b) for manipulation, and other state and federal laws), non-registrant commodity exchanges (for failure to regulate, under 7 U.S.C. § 7a(8)), and other non-registrants (for CEA manipulation and other federal violations) in connection with the Hunt's mammoth silver debacle, would be forced into a wonderland of civil procedure. *Amicus* Friedman would have to sue the non-registrants in federal court, where he might not be able to obtain complete relief for want of necessary (registrant) defendants. Meanwhile Friedman would have to sue the registrant brokerages for reparations before the CFTC and be similarly unable to make out his claims there in the absence of the non-registrant defendants. Meanwhile, the futures commission merchant is suing him in state court, and, most ironic of all, *amicus* would lack the ability to assert CEA violations as *counterclaims* in that state action if those claims be required to be brought in reparations. All of this irrationality results only if this Court holds, as petitioner asks, that Congress *sub silentio* divested the federal courts of the power to entertain, in a global way, claims based on federal commodity laws.

* Now, however, already seriously backlogged because of inadequate staffing of the CFTC reparations section. CFTC Annual Report for 1979, at 29.

C. Express Provisions of the CEA Show Congressional Intent to Create and Preserve an Implied Private Right of Action.

Petitioner here, in insisting that Congress extinguished the private right of action in 1974 by not expressly stating otherwise, poses as champion of the explicit wording of the CEA. Yet by insisting that no *implied* right of action exists under 7 U.S.C. § 6b of the CEA for fraud by registered persons, petitioner repudiates the *express* language of 7 U.S.C. § 18, the reparations provision enacted in 1974 as Section 14 of the CEA.

Subsection (a) of 7 U.S.C. § 18 reads in full as follows:

> (a) Any person complaining of any violation of any provision of this chapter or any rule, regulation, or order thereunder by any person who is registered or required to be registered under section 6d, 6e, 6j, or 6m of this title *may*, at any time within two years after the cause of action accrues, apply to the Commission by petition, which shall briefly state the facts, whereupon, if, in the opinion of the Commission, the facts therein contained warrant such action, a copy of the complaint thus made shall be forwarded by the Commission to the respondent, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be prescribed by the Commission. [Emphasis supplied.]

Note that the provision (1) *expressly* places in the hands of the investor the *option* of initiating reparations proceedings against a registered futures commission merchant, floor broker, commodity trading advisor or commodity pool operator, (2) *nowhere* expressly purports to divest federal courts of their pre-1974 jurisdiction over such claims

against registered persons, and (3) gives no reciprocal rights to registered persons to bring administrative actions against investors (*i.e.*, the public was to receive an additional shot at cheaters, see fn. p. 1 *supra*, but cheaters were not granted an additional shot at the public). This express language gives absolutely no support to petitioner's view that reparations under 7 U.S.C. § 18 were meant to oust the federal courts of their comprehensive jurisdiction over private claims (and related brokerage counterclaims) under the CEA.

Indeed, this express language of 7 U.S.C. § 18, in giving the investor the option to initiate reparations, in nowhere divesting courts of their pre-1974 jurisdiction over registered persons, and in giving no reciprocal rights to registered persons to initiate reparations, is unequivocal in its objective to protect the investing public against registered persons, and *not* to create any special benefits for registered persons as against the investing public. The objective of the 1974 CEA Amendments was to *strengthen* regulation of what had been referred to as the "badlands of the commodities markets," *Hecht* v. *Harris, Upham & Co., supra*, 283 F. Supp. at 435. It had been primarily futures commission merchants, floor brokers, commodity trading advisors and commodity pool operators who had engaged in the "unscrupulous tactics, manipulation, and irresponsible trading," *Precious Metals Associates* v. *CFTC, supra*, 620 F.2d at 905, which Congress attempted to bring under control in 1974. Everything in the legislative history of the 1974 Amendments thus accords with the express language of 7 U.S.C. § 18: reparations was meant to be a *supplemental* remedy for the benefit of investors, not a procedure

supplanting investor rights of action to the benefit of commodity professionals.

In an attempt to avoid this clear import of the express language of 7 U.S.C. § 18, petitioner interprets 7 U.S.C. § 2, the provision granting "exclusive jurisdiction" to the CFTC, as ousting the federal courts of their pre-1974 jurisdiction over private claims against registered persons. Yet this very reading of 7 U.S.C. § 2 by petitioner flies in the face of the express wording of the *next sentence* of 7 U.S.C. § 2 following the "exclusive jurisdiction" proviso: "Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State."

To recapitulate this review of *express* provisions of the CEA, petitioner seeks to avoid the expressly optional character of reparations proceedings by citing to the "exclusive" CFTC jurisdiction language of 7 U.S.C. § 2, which language itself is *expressly* stated by Congress to leave unaffected the pre-1974 jurisdiction of federal and state courts.

If petitioner's view were not an untenable reading of the express language of the CEA, it would still contradict the unequivocal legislative history of 7 U.S.C. § 2. The relevant Senate, House and Conference Committee reports all show that the intent of the "exclusive jurisdiction" language was to preclude other *agencies*, primarily the Securities and Exchange Commission but also other federal and state agencies, from interfering in CFTC administration of the commodity futures regulatory scheme. See, *e.g.*, [1974] U.S. Code Cong. & Admin. News 5843, 5848,

5863-64, 5870 (Reprinting Senate Report 93-1131) and 5894, 5897 (House Conference Report 93-1383). Similarly, the CFTC itself has always viewed 7 U.S.C. § 2 as protecting its jurisdiction from encroachment by other federal and state agencies. See CFTC Memorandum, *supra*, Comm. Fut. L. Rptr. [CCH] ¶ 20,218 [1975-77 Transfer Binder] *passim*, but particularly at p. 21,190.

In short, both the express language of 7 U.S.C. § 18 (creating an *optional* reparations procedure) and of 7 U.S.C. § 2 (preserving court jurisdiction), supported by legislative history, refute petitioner's contention the pre-1974 private court actions against brokers under 7 U.S.C. § 6b have been ousted by the reparations procedure. Fraud by brokers in commodity futures transactions remains actionable in federal court, just as it has been since at least 1967. See *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440, 447 (N.D. Ill. 1967).

Further express indication that Congress preserved the implied private right of action is offered by Section 5a(11) of the CEA, 7 U.S.C. § 7a(11), part of the 1974 Amendments, which requires contract markets to provide arbitration procedures, but specifies that such procedures "shall be voluntary."

II.

Application of the *Cort* v. *Ash* Analysis Similarly Compels the Conclusion that Congress Intended in 1974 and Thereafter to Preserve the Private Right of Action Under Section 4b of the CEA, 7 U.S.C. § 6b.

In *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), this Court set forth a four-pronged analysis to guide courts in determining whether an implied cause of action should be read into any given federal statute. The four following subheadings touch upon each of those *Cort* v. *Ash* considerations.

A. Section 4b, 7 U.S.C. § 6b, is by Its Terms Expressly Enacted for the Especial Benefit of Participants In Commodity Futures Markets.

If petitioner purports to worship at the shrine of express statutory language, nothing could be clearer than that 7 U.S.C. § 6b was expressly enacted for the especial benefit of investors such as respondent here and *amicus* Friedman:

> **§ 6b. Contracts designed to defraud or mislead; bucketing orders; buying and selling orders for commodities**
>
> It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made or to be made, on or subject to the rules of any contract market, *for or on behalf of any other person*, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any

commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, *for or on behalf of any other person* if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud *such other person;*

(B) willfully to make or cause to be made *to such other person* any false report or statement thereof, or willfully to enter or cause to be entered *for such person* any false record thereof;

(C) willfully to deceive or attempt to deceive *such other person* by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract *for such person*; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent *of such person* to become the buyer in respect to any selling order *of such person*, or become the seller in respect to any buying order *of such person* . . . [Emphasis supplied.]

By its express terms, therefore, 7 U.S.C. § 6b is directed solely toward the protection of a well-defined class: participants in the commodity futures markets. Such investors, and only such investors, are the "other person(s)" referred to in the statute as the targets of proscribed conduct.

Petitioner hides behind a truism when it argues that "the CEA proscribe(s) activities deemed detrimental to commerce." Brief of Petitioner at 26. *All* regulatory prohibitions are presumed by Congress to serve some higher, generalized social purpose, beyond protecting the narrow class of persons (here, commodity investors) specifically identified in the statute. Congress presumably always has a wider social objective (here, protecting commerce in commodities) when it protects a narrow class of specified persons (here, again, the class of commodity investors). The only question in cases such as this is to identify that narrower class, if such there be, for whose "especial benefit" the statute was enacted. Plain statutory language here gives us a clear answer to that question.

Peitioner creates a smokescreen in invoking *California* v. *Sierra Club*, 101 S. Ct. 1775 (1981), which construed a proscription against obstructing navigable waters. There "(t)he language of the statute (33 U.S.C. § 403) and its legislative history do not suggest that the Act was intended to create federal rights for the especial benefit of a class of persons but rather was intended to benefit the public at large . . ." *Ibid* at 1781. In other words, the statute in *Sierra Club* makes no mention of, say, "riparian landowners," "shipping companies," "shippers," or any other class arguably directly implicated in the larger public interest. Where no potential plaintiffs are described, courts are naturally reluctant to imply a cause of action. Such is not the case where the CEA is involved, and particularly here where the express language of 7 U.S.C. § 6b is in issue.

Nor should any Court be confused by petitioner's attempt, Brief of Petitioner at 26, to fragment the class of

commodity investors into meaningless subclasses: "hedgers, speculators, shippers, dealers, millers, commission merchants, exchanges, floor traders and others" are all under the umbrella of the CEA, according to petitioner. Yet most of the specious groups enumerated by petitioners overlap, more or less completely, or even swallow one another whole, and thus have no real legal significance; others of petitioner's enumerated groups (*e.g.*, exchanges, shippers) do not fall within the protected class and thus do not have an implied right of action under any view of the law. In short, 7 U.S.C. § 6b expresses an "unmistakable focus" on a class of protected potential plaintiffs, however petitioner might seek to blur that focus.

When faced with this same question as to whether 7 U.S.C. § 6b "was enacted for the benefit of an *especial* class of which plaintiff is a member" (emphasis in original) the District Court of New Jersey concluded, as does *amicus* here, that: "The language of the Act itself answers this question [in the affirmative]." *Alken* v. *Lerner*, 485 F. Supp. 871, 875 (D.N.J. 1980).

B. Explicit and Implicit Indications of Legislative Intent Bear Out the Congressional Intent to Preserve the Private Right of Action Under Section 4b, 7 U.S.C. § 6b.

Divining Congressional intent is of course the objective of the entire *Cort* exercise, such that explicit and implicit indications of that legislative intent are the most important of the four areas of the *Cort* analysis. This Court already has before it, in this and related cases, an ample exegesis of the legislative history as set forth in Congressional

reports, hearings and debates, all of which provide powerful evidence that Congress had no intention to extinguish the pre-1974 private right of action under the CEA. See, *e.g., New York Mercantile Exchange* v. *Leist* and related cases Nos. 80-757, 80-895 and 80-836, Brief of CFTC as *Amicus Curiae* at pp. 10-12, 20-22, 23-26, Brief of Respondents Leist *et al.* at pp. 25-34, 36-38.

Amicus here thus will not belabor this most important analysis of legislative history, except to point out that petitioner here approaches this legislative history from precisely the wrong direction.

Petitioner couches its entire analysis of the legislative history in terms of whether Congress in 1974 *created* an implied private right of action under the CEA, rather than whether Congress *preserved* the private right of action previously routinely acknowledged by the courts to exist.

Yet *Cort* does not require that Congressional intent be distorted by such an attempt to ascertain it *in vacuo*. As this Court stated in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979):

> We of course adhere to the strict approach followed in our recent cases, but our evaluation of congressional action in 1979 must take into account this *contemporary legal context*. In sum it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactments to be interpreted in conformity with them. (Emphasis added.)

441 U.S. at 701. The "contemporary legal context" at bar was uniform judicial acceptance of a private right of action

under the CEA, as of 1974. This case, therefore, should properly be viewed as presenting the question as to whether Congress *sub silentio* overturned a solid body of judicial precedent, rather than whether Congress "implied" a right of action *de novo*.

In conjunction with this fundamental misstatement of the legislative context in which Congress acted in 1974, petitioner further seeks to discredit those of the cases which embraced the private right of action under the CEA which rely, in whole or in part, on a "tort per se" analysis. Yet the *current* validity of *past* legal reasoning is irrelevant to the "contemporary legal context" in which Congress acted in 1974. In 1974 there *was* an implied right of action under the CEA, and Congress proceeded on that basis. Compare, for example, the much more vivid and radical application of these "contemporary legal context" considerations in *Flood* v. *Kuhn*, 407 U.S. 258 (1972), where this Court refused to modify a unique, judicially implied immunity from the antitrust laws enjoyed by professional baseball:

> If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by Congress and not by this Court.

407 U.S. at 284.* Much better grounds for leaving in place what Congress has not expressly disavowed exist here, where the private right of action under the CEA, far from being illogical, meshes perfectly with the regulatory scheme, statutory structure, and express terms of the CEA. Con-

* Illogic and inconsistency here would lie in painting the 1974 Congress as having intended to achieve strengthened deterrence of abuses by eliminating, rather than supplementing, the existing deterrents.

versely, this Court should be slow to impute to Congress an intent to disavow the *status quo* where, as here, manifest injustice would result to investors who would be deprived of their sole comprehensive remedy for CEA abuses.

One final point must be made about the indicia of legislative intent here. Petitioner (Brief of Petitioner at 33) makes much of the 1978 enactment by Congress of an *express* authorization of *parens patria* actions under the CEA (7 U.S.C. § 13a-2). Why, asks petitioner, did Congress *explicitly* authorize the states to sue in 1978, while in 1974 *implicitly* granting a private right of action to individuals?*

The answer to this conundrum lies, as might be expected, in the legislative history of the *1978* Amendments to the CEA. That history clearly shows that Congress had before it earnest entreaties from state securities administrators that the 1974 Amendments to the CEA had fostered "huge nationwide commodity swindles," partly attributable to the squeezing out of state authorities by "the preemptive language found in Section 2(a)(1) of the Commodity Exchange Act" and partly because of the negative "attitude the Commission ha[d] adopted toward antifraud actions by other agencies." Statement of Thomas L. Krebs, Director of Alabama Securities Commission, Hearings Before the Senate Subcommittee on Agricultural Research Concerning Reauthorization of CFTC, Part II, (March, 1978) (hereinafter "Senate Sunset Hearings") p. 658.

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* Petitioner argues, as a make-weight, that 7 U.S.C. § 13a-2 provides "retention of control within the CFTC" of *parens patriae* suits, when in fact the statute provides little more to the CFTC than written notification of and a right to intervene in the state-initiated lawsuit.

Thus, while preemption of state agency action by the 1974 Amendments had opened a huge gap in regulatory control of commodities frauds, the states soon found themselves unable to close that gap by falling back upon state *parens patria* enforcement of *federal* [CEA] law, partly because the *parens patriae* procedure had been called into question by the new, minority line of federal cases questioning the existence of a private right of action. Senate Sunset Hearings at 673, Reprinting the Interim Staff Report to the Commodity Options Task Force of the North American Securities Administrators Association. More importantly, apart from the new questions as to whether the CEA gave a private right of action upon which to base *parens patriae* suits, there were serious procedural questions about the validity of the theory of *parens patriae* as a vehicle for *damage* actions. CFTC Memorandum, *supra*, [CCH] Comm. Fut. L. Rptr. ¶ 20,218 at p. 21,189, n. 22.

There were both technical and procedural problems with *parens patriae* that had to be addressed by Congress in 1978:

> The problems with proceeding under either of the two doctrines that the Commission has outlined are, first of all, as to parens patriae, it is a very tenuous doctrine. Not all the courts have recognized it and have only recognized it in limited circumstances. Suit can only be brought under that theory by the Attorneys General of the States, not by the regulators or by the enforcement agencies which are most familiar with financial crimes.

Testimony of C.G. Goodkind, Deputy Wisconsin Securities Commissioner, *Hearings on H.R. 10285 to Extend Commodity Exchange Act Before the Subcommittee on Conser-*

vation and Credit of the House Comm. on Agriculture, 95th Cong., 2d Sess. (1978) (hereinafter "House Sunset Hearings") p. 173. But the CFTC was anxious to keep *parens patriae* alive, since it would enforce *federal* [CEA] law with state manpower. In the words of CFTC Chairman Bagley, "We want their [the states'] help. We are starving for help." House Sunset Hearings at 90. But *no* change of law was involved: "What we are proposing in our amendment is that the States be entitled to enforce our regulations as we feel they can now. But we would codify it and put it in Federal Court." Testimony of CFTC Vice Chairman J.V. Rainbolt, House Sunset Hearings at 81. In short, the CFTC supported *parens patriae*, as it supports the private right of action, as an aide to enforcement of the CEA. Codification in 1978 was necessary primarily to resolve certain technical and procedural questions.

In short, the express enactment of *parens patria* authority in 1978 must be seen as part of a Congressional effort to staunch the deterioration of state agency enforcement action which had occurred under the regime established by the 1974 Amendments, and to resolve the broader technical and procedural questions as to whether any *parens patriae* action could seek money damages. The 1978 Amendments show that Congress moved to *prevent* the devolution upon the CFTC of sole responsibility for CEA enforcement, not, as petitioner would have it, to buttress the "exclusive jurisdiction" of the CFTC.

C. Implication of a Private Right of Action is Consistent With, Indeed a Keystone of, the Underlying Purposes of the Legislative Scheme.

In the words of Judge Friendly, *Leist* v. *Simplot*, *supra*, 638 F.2d at 296: "The history of congressional concern with commodity futures trading has thus been one of steady expansion in coverage and strengthening of regulation. . . . [This] increasingly strong regulation [was] designed to insure the existence of fair and orderly markets." In two words, the purpose of the 1974 Amendments, and to a lesser extent the purpose of the CEA generally, was to "strengthen deterrence" of abuses in the commodity futures markets. See fn. p. 1, *supra*.

D. Commodities Trading is Quintessentially a Federal Concern, such that the Private Right of Action Poses No Interference with the Concerns of the States.

Petitioner does not dispute that commodity futures regulation is essentially national in character. Brief of Petitioner at 39. Accordingly, state interests are no barrier to the creation or preservation of an implied private right of action under the CEA.

Conclusion

This Court should uphold the court of appeals below, and recognize that Congress intended to preserve a private right of action under 7 U.S.C. § 6b when it created the CFTC in 1974.

Respectfully submitted,

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